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W. H. S.

No. 11049

2413

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOOPER C. DUNBAR, GORDON B. MORRIS and
CRAIG C. HORTON, Trustees of Bell View Oil
Syndicate, a trust,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

AUG 24 1945

**PAUL P. O'BRIEN,
CLERK**

No. 11049

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FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

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Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

United States District Court
Southern District of California
Central Division

Civil Action No. 3259-PH

HOOPER C. DUNBAR, GORDON B. MORRIS, and
CRAIG C. HORTON, Trustees of Bell View Oil Syndicate, a Trust,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES PAID

The plaintiffs for a first cause of action complain of the defendant and respectfully allege:

I.

That at all times hereinafter mentioned the defendant was and now is a sovereign body politic, that the plaintiffs, Hooper C. Dunbar, Gordon B. Morris and Craig C. Horton were and now are the trustees of Bell View Oil Syndicate a trust, (hereinafter called the Trust) organized and existing under and by virtue of a certain written declaration of trust, dated January 20, 1922, as amended by a written declaration, dated September 10, 1925. All of said trustees are citizens of the United States and residents of and domiciled in the County of Los Angeles, State of California, within the Sixth Internal Revenue Collection District of the State of California, and at all times hereinafter mentioned maintained and now maintain offices of said trust in the City of Los Angeles, County of Los Angeles, State of California.

II.

[2]

That on or about November 7, 1940, December 16, 1940 and February 10, 1941, at the times of the collection from the plaintiffs and payment to the defendant of the taxes herein mentioned, Nat Rogan was the Collector of Internal Revenue in and for the Sixth Collection District of the State of California; that said Nat Rogan is not in office as such collector at the time of the commencement of this action.

III.

That no action upon the claims herein referred to other than as herein set forth, has been taken before the Congress or any of the departments of the Government of the United States, or in any court; that no assignment or transfer of said claim has been made; that plaintiffs are entitled to the amount herein claimed from the defendant and there is no just credit or offset against said claim which is known to plaintiffs.

IV.

Plaintiffs duly filed under the name of Bell View Oil Syndicate an original return on Form 940, for the year 1936 on or before January 31, 1937, for federal social security and unemployment taxes and paid the tax thereon in the sum of \$60.03.

V.

The Commissioner of Internal Revenue as a result of an examination of plaintiff's return, thereafter erroneously and illegally determined a deficiency in the amount of \$474.00, together with interest and penalty, as a result of his ruling that Craig C. Horton, Hooper C. Dunbar, and Gordon B. Morris, trustees of the Trust, were employees thereof, whose remunerations were subject to the provisions of Title IX of the Social Security Act

(hereinafter referred to as the Act), Chapter 531, Stat. 620-648, 42 U.S.C.A. Secs. 301-1305.

VI.

The said amount of \$474.00, together with interest and penalty in the sum of \$131.40, was thereafter assessed. Plaintiffs thereupon filed an amended return and on or about November 8, 1940, paid the sum of \$47.40 as shown thereon, the foregoing sum resulting from the credit allowed and taken for the amount paid to the State of California on or about November [3] 7, 1940 in the sum of \$639.90. On or about December 16, 1940, plaintiffs paid the further sum of \$13.08, representing interest and penalty upon the additional taxes thus assessed.

VII.

On the 22nd day of September, 1942, the plaintiffs filed a claim for refund of said additional taxes together with interest and penalty, on the ground that the trustees were not employees within the meaning of Title IX of the Act. A copy of the claim is attached hereto as Exhibit "A". The said claim was denied by the Commissioner of Internal Revenue in a letter dated July 12, 1943.

VIII.

That by reason of the facts hereinabove alleged, plaintiffs have been illegally and erroneously required to pay the additional taxes, together with interest and penalties, in the sum of \$60.48. That the said sum has not been refunded to the plaintiffs and the whole amount thereof, together with interest thereon is now due and owing.

Wherefore, plaintiffs pray for judgment against the defendant in the sum of \$60.48, together with interest thereon as provided by law, and for such other and further relief as the court may deem just and proper in the premises.

Plaintiffs for a second cause of action complain of the defendant and respectfully allege:

I.

Plaintiffs repeat and incorporate by reference paragraphs I, II and III hereinabove set forth in the first cause of action, with the same force and effect as if herein alleged and set out at length.

II.

Plaintiffs duly filed under the name of Bell View Oil Syndicate original return on or before January 31, 1938, on Treasury Form 940 for the year 1937 for social security and unemployment taxes and paid the tax thereon in the sum of \$70.69. [4]

III.

The Commissioner of Internal Revenue as a result of an examination of plaintiff's return thereafter erroneously and illegally determined a deficiency as a result of his ruling that Craig C. Horton, Hooper C. Dunbar and Gordon B. Morris, trustees of the Trust, were employees thereof, whose remunerations were subject to the provisions of Title IX of the Act in the amount of \$618.00, together with interest and penalties.

IV.

The said amount of \$618.00, together with interest and penalties in the sum of \$138.74, was thereafter assessed. Plaintiffs thereupon filed an amended return and on or about November 8, 1940 paid the sum of \$61.80, as shown on the amended return, the foregoing sum resulting from the credit allowed and taken for the amount paid to the State of California on or about November 7, 1940 in the sum of \$834.34. On or about December 16, 1940, plaintiffs paid the further sum of \$3.79, representing interest and penalty upon the additional taxes thus assessed.

V.

On the 22nd day of September, 1942, the plaintiffs filed a claim for refund of said additional taxes, together with interest and penalty, on the ground that the trustees were not employees within the meaning of Title IX of the Act. A copy of the claim is attached hereto as Exhibit "B". The said claim was denied by the Commissioner of Internal Revenue in a letter dated July 12, 1943.

VI.

That by reason of the facts hereinabove alleged, plaintiffs have been illegally and erroneously required to pay the additional taxes, together with interest and penalties, in the sum of \$65.59. That the said sum has not been refunded to the plaintiffs and the whole amount thereof, together with interest thereon is now due and owing.

Wherefore, plaintiffs pray for judgment against the defendant in the sum of \$65.59, together with interest thereon as provided by law, and for such other and further relief as the court may deem just and proper in [5] the premises.

Plaintiffs for a third cause of action complain of the defendant and respectfully allege:

I.

Plaintiffs repeat and incorporate by reference paragraphs I, II and III hereinabove set forth in the first cause of action, with the same force and effect as if herein alleged and set out at length.

II.

Plaintiffs duly filed under the name of Bell View Oil Syndicate original return on or before January 31, 1939 for social security and *employment* taxes and paid the tax thereon in the sum of \$96.13, for the year 1938.

III.

The Commissioner of Internal Revenue as a result of an examination of plaintiff's return, thereafter erroneously and illegally determined a deficiency in the amount of \$415.50, together with interest and penalty, as a result of his ruling that Craig C. Horton, Hooper C. Dunbar, and Gordon B. Morris, trustees of the Trust, were employees thereof, whose remunerations were subject to the provisions of Title IX of the Social Security Act (hereinafter referred to as the Act), Chapter 531, Stat. 620-648, 42 U.S.C.A. Secs. 301-1305.

IV.

The said amount of \$415.50, together with interest and penalty in the sum of \$68.08, was thereafter assessed. Plaintiffs thereupon filed an amended return and on or about November 8, 1940 paid the sum of \$41.55, as shown on the amended return, the foregoing sum resulting from the credit allowed and taken for the amount paid to the State of California on or about November 7, 1940 in the sum of \$512.45. On or about December 16, 1940, plaintiffs paid the further sum of \$6.65, representing interest and penalty upon the additional tax thus assessed.

V.

On the 22nd day of September, 1942, the plaintiffs filed a claim [6] for refund of said additional taxes, together with interest and penalty, on the ground that the trustees were not employees within the meaning of Title IX of the Act. A copy of the claim is attached hereto as Exhibit "C". The said claim was denied by the Commissioner of Internal Revenue in a letter dated July 12, 1943.

VI.

That by reason of the facts hereinabove alleged, plaintiffs have been illegally and erroneously required to pay the additional taxes, together with interest and penalties,

in the sum of \$48.20. That said sum has not been refunded to the plaintiffs and the whole amount thereof, together with interest thereon is now due and owing.

Wherefore, plaintiffs pray for judgment against the defendant in the sum of \$48.20, together with interest thereon as provided by law, and for such other and further relief as the court may deem just and proper in the premises.

Plaintiffs for a fourth cause of action complain of the defendant and respectfully allege:

I.

Plaintiffs repeat and incorporate by reference paragraphs I, II and III hereinabove set forth in the first cause of action, with the same force and effect as if herein alleged and set out at length.

II.

Plaintiffs duly filed under the name of Bell View Oil Syndicate original return on or before January 31, 1940, on Form 940 for the year 1939 for social security and unemployment taxes and paid the tax thereon in the sum of \$89.11.

III.

The Commissioner of Internal Revenue caused a ruling to be issued that Craig C. Horton, Hooper C. Dunbar and Gordon B. Morris, trustees of the Trust, were employees thereof whose remunerations were subject to the provisions of Title IX of the Social Security Act (hereinafter referred to as the [7] Act), Chapter 531, 49 Stat. 620-648, 42 U.S.C.A. Secs. 301-1305.

IV.

Plaintiffs thereupon on or about November 8, 1940, filed an amended return and paid the sum of \$28.80, as

shown thereon, the foregoing sum resulting from the credit allowed and taken for the amount paid to the State of California on or about November 7, 1940. On or about February 10, 1941 plaintiffs paid the further sum of \$1.34, representing interest and penalty upon the additional tax thus assessed.

V.

On the 22nd day of September, 1942, the plaintiffs filed a claim for refund of said additional taxes together with interest and penalty, on the ground that the trustees were not employees within the meaning of Title IX of the Act. A copy of the claim is attached hereto as Exhibit "D". The said claim was denied by the Commissioner of Internal Revenue in a letter dated July 12, 1943.

VI.

That by reason of the facts hereinabove alleged, plaintiffs have been illegally and erroneously required to pay the additional taxes, together with interest and penalties, in the sum of \$30.14. That the said sum has not been refunded to the plaintiffs and the whole amount thereof, together with interest thereon is now due and owing.

Wherefore, plaintiffs pray for judgment against the defendant in the sum of \$30.14, together with interest thereon as provided by law, and for such other and further relief as the court may deem just and proper in the premises.

A. CALDER MACKAY
ARTHUR McGREGOR
HOWARD W. REYNOLDS [8]

State of California,
County of Los Angeles—ss.

Hooper C. Dunbar, Gordon B. Morris and Craig C. Horton, being duly sworn, say that they are the plaintiffs

above named; that they have read the foregoing Complaint for Recovery of Taxes Paid and know the contents thereof and that the same is true of their own knowledge, except the matters which are therein stated to be upon information and belief and that as to those matters they believe it to be true.

HOOPER C. DUNBAR
GORDON B. MORRIS
CRAIG C. HORTON

Subscribed and sworn to before me this 25th day of October, 1943.

(Seal) DOROTHY M. CREAMER
Notary Public in and for said County and State
My commission expires Sept. 28, 1947. [9]

[EXHIBIT "A".]

Form 843
Treasury Department
Internal Revenue Service
(Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment Was
Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- | | |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | Refund of Tax Illegally Collected. |
| <input type="checkbox"/> | Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess. |
| <input type="checkbox"/> | Abatement of Tax Assessed (not applicable to
estate or income taxes). |

Collector's Stamp
(Date received)

State of California }
County of Los Angeles } ss:

Name of taxpayer or

purchaser of stamps Bell View Oil Syndicate

Type Business address 555 South Flower Street, Los
or (Street)

Print Angeles, California.

(City) (State)

Residence _____

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Sixth, California
 2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1936, to Dec. 31, 1936
 3. Character of assessment or tax Unemployment or S.S. IX-1936 additional tax, penalty & interest.
 4. Amount of assessment, \$.....; dates of payment
 5. Date stamps were purchased from the Government.....
 6. Amount to be refunded \$47.40 tax, plus \$13.08 penalty & interest \$60.48 plus interest
 7. Amount to be abated (not applicable to income or estate taxes) \$.....
 8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19...., on 19,....

The deponent verily believes that this claim should be allowed for the following reasons:

See attached statement

(Attach letter-size sheets if space is not sufficient)

Signed BELL VIEW OIL SYNDICATE

by C. C. HORTON, Trustee

by HOOPER C. DUNBAR, Trustee

by G. B. MORRIS, Trustee.

Sworn to and subscribed before me this

21st day of September 1942

MARY E. WHITTHORNE, Notary Public

(Signature of officer administering oath) (Title)

(See Instructions on Reverse Side)

[10]

I.

Claimant filed its original return on Form 940 for the year 1936 and paid a tax thereon in the sum of \$60.03. Under date of September 24, 1940, the Commissioner of Internal Revenue in his letter bearing the symbols A&C: A:AA:4:LGB ruled that this claimant was subject to additional social security taxes on its three trustees. Amended return on Form 940 were prepared by this claimant for this year and filed with the Collector of Internal Revenue on or about November 8, 1940, showing additional taxes by reason of the above ruling of \$47.40. This tax results after proper credit has been allowed for the amount due the State of California which was paid on or about November 7, 1940, in the sum of \$639.90 for said year. On or about December 16, 1940, this claimant paid the further sum of \$13.08 representing interest and penalty upon the additional taxes thus as-

sessed. It is the contention of claimant that these sums, together with interest thereon, should be refunded.

II.

The taxes involved are social security taxes which the revenue agent contends are collectible under Title IX of the Social Security Act. The problem involved is to determine whether or not the trustees are "employees" of the Bell View Oil Syndicate within the meaning of Section 907 of the Act.

On January 20, 1922, H. W. McFarlane transferred Lot No. 5, Block 82, in Santa Fe Springs to five named trustees. Said trustees, who now constitute those designated by the revenue agent as "employees", were by the terms of the trust instrument directed to drill a well thereon in search of oil. Said instrument vests in the trustees authority to deal with the subject matter of the trust in so far as may be necessary for the production and sale of oil, but the trustees are expressly denied authority to impose any personal liability upon the owners of beneficial interest through obligations incurred by them. [11]

The trust instrument provides that the trustees shall call annual meetings of the holders of beneficial interests, making a full report to them at that time, showing receipts and disbursements made during the year. Although the holders of the beneficial interests have voting rights, nothing in said trust indenture defines the matters upon which their vote shall be controlling, except with respect to the termination of the trust. The instrument further provides that any vacancy occasioned by the death or resignation or refusal to act of any trustee may be filled by the remaining trustees. It is further provided that neither the death of a trustee nor of an owner of beneficial interest shall work a dissolution of the trust there-

by established. The trustees have the power to fix their own remuneration, provided, however, that all expenses shall not exceed 10% of all monies received. After providing for the sale by the trustees of units of beneficial interest the instrument provides that the trustees shall not be liable for any mistake in judgment and that their liability shall be confined to wilful breaches of the trust imposed upon them.

LAW AND ARGUMENT.

Section 907 (c) of the Social Security Act limits the application of the Act to a tax upon "employment". (See Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, 81 L. ed. 1279.) That section provides in part as follows:

"The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer * * *."

It is the claimant's contention that the trustees of the Bell View Oil Syndicate do not constitute "employees" within the meaning of the Act and that therefore the taxes assessed were erroneous and illegal.

It is well established that in construing an act of Congress, words are to be given their natural significance, (Lincoln v. Ricketts, 297 U.S. 373, 80 L. [12] ed 724) and they should be applied according to their usual acceptance unless Congress has plainly indicated an intention that they shall be construed otherwise. (Avery v. Commissioner of Internal Revenue, 292 U.S. 210, 78 L. ed. 1216.) Thus, when Congress used the term "employee" in the Social Security Act, it must have intended that the term be construed according to its common acceptance.

Article 205 of Regulations 90 provides in part as follows:

"Generally the relationship (employment) exists when the person for whom services are performed has the right to contest and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which the result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. * * *

The same terms are to be found in the Employers' Liability Act and the Supreme Court has held that they are used in their ordinary meanings. (*Hull vs. Philadelphia & Reading Ry. Co.* 252 U. S. 475, 64 L. ed. 670) with the result that the question of whether a person is an employee is to be resolved by determining whether or not the alleged employer *returns* "detailed control" of its employee's actions. (*Chicago R. I. & P. Ry. Co. v. Bond*, 240 U. S. 449, 60 L. ed. 735.)

In the case of this particular claimant it is clear that it reserved no "detailed control" over the acts of its trustees and it had no authority to define how they should act in accomplishing the purposes stated in the declaration of trust. That instrument directs them to drill a well for the production of oil. It vests in them the sole discretion for determining what contracts shall be let, to whom said contracts shall be extended, and the manner and terms of payment. Materials shall be selected by them suitable to the needs as they see them. The only limitation on said trustees is that the fund expended shall not exceed the subscribed capital outlay. In short, they are ap-

pointees under a trust agreement to manage the trust property and are authorized to withhold as compensation for administration, an amount not exceeding ten per cent of all moneys received. That [13] amount must cover the entire administration costs. The trustees may agree as among themselves how they shall divide the compensation to which they are entitled but nothing in the declaration of trust limits them to stipulated salaries.

The foregoing is sufficient to show that the test set up in Article 205 of regulations 90 excludes this claimant from the imposition of the tax; however, additional authorities have been found which support the taxpayer's contention and are worthy of consideration.

In the recent case of *Griswold v. U. S.*, 36 Fed. Supp. 714 (1941), the Court was presented with a factual situation very similar to the one here under consideration. That case involved a trust, where the trustees were the owners of the trust property and were not subject to the control or direction of the shareholders. Also the matter under consideration was the legality of the Social security taxes assessed upon their remuneration as trustees, and the sole problem presented was whether the Trustees were employees under the terms of Title IX of the Social Security Act. In holding that the trustees were definitely not employees under the Act, the Court used the following language on page 718:

"The trustees of this trust are the embodiments of the trust and the trust can only exist when they exist. * * * There is no trust apart from the

trustees. * * * The trust, as distinguished from the trustees, cannot contract or act, and the trustees cannot contract with themselves. They cannot be both employers and employees. The trustees do not employ themselves."

Also, on page 720 the Court said:

"All the shareholders have here is the right to have the property managed for their benefit with no right to instruct the trustees how to do it. No one exercised any control over the trustees. * * * It is plainly apparent that within the terms of Article 205 of Treasury Regulations 90, these trustees are not by any means employees of any separate entity that Section 1101 (a) (3) could be construed to create. The Regulations recognize a trustee or other fiduciary may be an employer, but hardly point out that they may be both employers and employees. The trustees here are not employees in any sense of the word; they are principals subject as far as control is concerned only to the terms of the trust indenture." [14]

On December 19, 1941, the Circuit Court of Appeals, First Circuit, 124 Fed. (2d) 599, affirmed this same case. On page 601, the Court said:

"The relationship of employer and employee in the ordinary sense does not exist here. These trustees render services and receive compensation, but we do not feel that they are subject to such supervision and control as to make them employees within the scope of the congressional intent. * * *

* * * Since these plaintiffs are not subject to control, they are not employees within the meaning

of the Act. We are not holding that no trustee is an employee. We are merely holding that these plaintiffs are not employees. Of course, there may be a case where a trustee is subject to such control that he would be an employee within the meaning of the Act. This is not such a case."

In view of the foregoing authorities, the claimant respectfully submits that its trustees are not employees within the meaning of the Act. The additional amounts so assessed, together with interest thereon, should be refunded.

III.

Claimant requests and demands such further or additional refund or refunds as may now or hereafter appear to be due it by reason of the foregoing or on account of (a) any mistake in fact or in law made by itself or any officer, clerk or other employee of the United States Treasury Department in the preparation, amendment and/or adjustment of said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee of the United States Treasury Department, (d) any repealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law, whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with said return, whether covered by the foregoing or not so covered. [15]

[EXHIBIT "B".]

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment Was
Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- Refund of Tax Illegally Collected.
 - Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
 - Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp
(Date received)

State of California }
County of Los Angeles } ss:

Name of taxpayer or
purchaser of stamps Bell View Oil Syndicate

Type Business address 555 South Flower Street Los
or (Street)

Print Angeles California
 (City) (State)

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed) Sixth California
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1937, to Dec. 31, 1937
3. Character of assessment or tax Unemployment or SS IX-1937 additional tax, penalty and interest
4. Amount of assessment, \$.....; dates of payment
5. Date stamps were purchased from the Government.....
6. Amount to be refunded \$61.80 tax, plus \$3.79 penalty and interest \$65.59 plus interest
7. Amount to be abated (not applicable to income or estate taxes) \$.....
8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19..., on 19,....

The deponent verily believes that this claim should be allowed for the following reasons:

See attached statement

(Attach letter-size sheets if space is not sufficient)

Signed BELL VIEW OIL SYNDICATE
by C. C. HORTON, Trustee
by HOOPER C. DUNBAR, Trustee
by G. B. MORRIS, Trustee.

Sworn to and subscribed before me this

21st day of September 1942

MARY E. WHITTHORNE, Notary Public

(Signature of officer administering oath) (Title)

(See Instructions on Reverse Side)

[16]

[EXHIBIT "C".]

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment Was
Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- Refund of Tax Illegally Collected.
 - Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
 - Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp
(Date received)

State of California }
County of Los Angeles } ss:

Name of taxpayer or
purchaser of stamps Bell View Oil Syndicate

Type Business address 555 South Flower Street Los
or (Street)

Print Angeles California
 (City) (State)

Residence
.....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed. Sixth California
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1938, to Dec. 31, 1938
3. Character of assessment or tax Unemployment or SS IX-1938 Addtl. tax, penalty and interest
4. Amount of assessment, \$.....; dates of payment
5. Date stamps were purchased from the Government.....
6. Amount to be refunded \$41.55 tax, plus \$6.65 penalty and interest \$48.20 plus interest
7. Amount to be abated (not applicable to income or estate taxes) \$
8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19..., on 19,....

The deponent verily believes that this claim should be allowed for the following reasons:

See attached statement

(Attach letter-size sheets if space is not sufficient)

Signed BELL VIEW OIL SYNDICATE
by C. C. HORTON, Trustee
by HOOPER C. DUNBAR, Trustee
by G. B. MORRIS, Trustee.

Sworn to and subscribed before me this

21st day of September 1942

MARY E. WHITTHORNE, Notary Public

(Signature of officer administering oath) (Title)

(See Instructions on Reverse Side)

[22]

{EXHIBIT "D".}

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment Was
Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- Refund of Tax Illegally Collected.
 - Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
 - Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp
(Date received)

State of California }
County of Los Angeles } ss:

Name of taxpayer or
purchaser of stamps Bell View Oil Syndicate

Type Business address 555 South Flower St., Los An-
or (Street)

Print geles, California.
(City) (State)

Residence _____

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Sixth, California
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1939, to Dec. 31, 1939
3. Character of assessment or tax Unemployment—S.S. IX-1939 Additional tax and interest
4. Amount of assessment, \$.....; dates of payment
5. Date stamps were purchased from the Government.....
6. Amount to be refunded \$28.60 tax, plus \$1.84 interest \$30.14 plus interest
7. Amount to be abated (not applicable to income or estate taxes) \$.....
8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19..., on 19,....

The deponent verily believes that this claim should be allowed for the following reasons:

See attached statement.

(Attach letter-size sheets if space is not sufficient)

Signed BELL VIEW OIL SYNDICATE
by C. C. HORTON, Trustee
by HOOPER C. DUNBAR, Trustee
by G. B. MORRIS, Trustee.

Sworn to and subscribed before me this

21st day of September 1942

MARY E. WHITTHORNE, Notary Public

(Signature of officer administering oath) (Title)

(See Instructions on Reverse Side)

[28]

[Endorsed]: Filed Oct. 27, 1943. [33]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled action and, in answer to plaintiffs' first cause of action, admits, denies and alleges:

I.

Admits the allegations contained in Paragraph I thereof.

II.

Admits the allegations contained in Paragraph II thereof, except that payments to the Collector were made November 9, 1940, instead of November 7, 1940, and February 11, 1941, instead of February 10, 1941.

III.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph III thereof, except that defendant specifically denies that plaintiffs are entitled to the amount therein claimed from the defendant. [34]

IV.

Admits the allegations contained in Paragraph IV thereof.

V.

Admits the allegations contained in Paragraph V thereof, except that defendant denies that said Commissioner of Internal Revenue erroneously and/or illegally determined a deficiency in the amount of \$474.00 or any other amount, together with interest and/or penalty.

VI.

Admits the allegations contained in Paragraph VI thereof, except that the defendant alleges that the sum of the interest and penalty was \$100.24 instead of \$131.40.

VII.

Admits the allegations contained in Paragraph VII thereof.

VIII.

Denies the allegations contained in Paragraph VIII thereof, except that defendant admits that plaintiffs were required to pay additional taxes, together with interest and penalty, in the sum of \$60.48, and that none of said sum has been refunded to plaintiffs.

In answer to plaintiffs' second cause of action, defendant admits, denies and alleges:

I.

Incorporates herein as if herein set forth in full what was said in answer to Paragraphs I, II and III of plaintiffs' first cause of action.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Denies the allegations contained in Paragraph III thereof, except that defendant admits that the Commissioner of Internal Revenue, as a result of an examination, determined a deficiency in the amount of \$618.00, together with interest and penalties. [35]

IV.

Admits the allegations contained in Paragraph IV thereof, except that defendant alleges that the sum of interest and penalties collected was \$99.79 instead of \$138.74, and that the date of the payment of the tax under the amended return was November 9, 1940, instead of November 8, 1940.

V.

Admits the allegations contained in Paragraph V thereof.

VI.

Denies the allegations contained in Paragraph VI thereof, except that defendant admits that plaintiffs were required to pay additional taxes, together with interest and penalties, in the sum of \$65.59, and that none of the said sum has been refunded.

In answer to plaintiffs' third cause of action, defendant admits, denies and alleges:

I.

Incorporates herein as if herein set forth in full what was said in answer to Paragraphs I, II and III of plaintiffs' first cause of action.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Admits the allegations contained in Paragraph III thereof, except that defendant specifically denies that the

Commissioner of Internal Revenue erroneously and/ or illegally determined a deficiency in the amount of \$415.50, or any other amount, together with interest and penalties.

IV.

Admits the allegations contained in Paragraph IV thereof, except that defendant specifically alleges that the sum of the interest and penalties was \$43.12 instead of \$68.08.

V.

Admits the allegations contained in Paragraph V thereof. [36]

VI.

Denies the allegations contained in Paragraph VI thereof, except that defendant admits that plaintiffs have been required to pay additional taxes, together with interest and penalties, in the sum of \$48.20, and that none of said sum has been refunded to plaintiffs.

In answer to plaintiffs' fourth cause of action, defendant admits, denies and alleges:

I.

Incorporates herein as if herein set forth in full what was said in answer to Paragraphs I, II and III of plaintiffs' first cause of action.

II.

Admits the allegations contained in Paragraph II thereof.

III.

Admits the allegations contained in Paragraph III thereof.

IV.

Admits the allegations contained in Paragraph IV, except that defendant specifically alleges that the payments therein mentioned were made November 9, 1940, instead of November 7, 1940, and February 11, 1941, instead of February 10, 1941.

V.

Admits the allegations contained in Paragraph V thereof.

VI.

Denies the allegations contained in Paragraph VI thereof, except that defendant admits that plaintiffs have been required to pay additional taxes, together with interest and penalties, in the sum of \$30.14, and that none of said sum has been refunded to plaintiffs.

Wherefore, having fully answered, defendant prays that plaintiffs take [37] nothing by their action, and that defendant be dismissed with its costs in this behalf expended.

CHARLES H. CARR
United States Attorney

E. H. MITCHELL
Assistant United States Attorney

WALTER S. BINNS
Assistant United States Attorney

EUGENE HARPOLE,
Special Attorney Bureau of Internal Revenue
By WALTER S. BINNS
Attorneys for Defendant

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by counsel for the respective parties herein that the following facts are true and may be considered in evidence:

(1) That at all times hereinafter mentioned, the defendant was and now is a sovereign body politic, that the plaintiffs, Craig C. Horton, Hooper C. Dunbar and Gordon B. Morris were and now are the trustees of Bell View Oil Syndicate, a trust organized and existing under and by virtue of a certain written declaration of trust, dated January 20, 1922, as amended by a written declaration, dated September 10, 1925, and as further amended by a written declaration, dated January 20, 1942. All of said trustees are citizens of the United States and residents of and domiciled in the County of Los Angeles, State of California, within the Sixth Internal Revenue Collection District of the State of California, and at all times hereinafter mentioned maintained and now maintain offices of said trust in the City of Los Angeles, County of Los Angeles, State of [39] California.

(2) That on November 9, 1940, November 19, 1940, December 16, 1940, December 18, 1940 and February 11, 1941, at the times of the collection from the plaintiffs and payment to the defendant of the taxes herein mentioned, Nat Rogan was the Collector of Internal Revenue in and for the Sixth Collection District of the State of California; that said Nat Rogan is not in office as such collector at the time of the commencement of this action.

(3) That plaintiffs duly filed under the name of Bell View Oil Syndicate an original return on Form 940, for

the year 1936, on February 2, 1937, for federal social security and unemployment taxes, and paid the tax thereon in the sum of \$60.03. That after an examination of plaintiff's return, the Commissioner of Internal Revenue determined a deficiency in the amount of \$474.00, together with interest and penalty, as a result of his ruling that the trustees of the trust were employees thereof, whose remunerations were subject to the provisions of Title IX of the Social Security Act, Chapter 531, Stat. 620-648, 42 U. S. C. A., sections 1301-1305. That the trustees and their remunerations in respect to which the deficiency was assessed are as follows:

<u>Trustee</u>	<u>Trustee's Fees 1936</u>
Craig C. Horton	\$18,000.00
Hooper C. Dunbar	16,200.00
Gordon B. Morris	13,200.00
Total	 \$47,400.00

(4) That said amount of \$474.00, together with interest and penalty in the sum of \$100.24, was thereafter assessed. Plaintiffs thereupon filed an amended return for the year 1936, and on November 9, 1940, plaintiffs paid the sum of \$47.40, having taken credit of ninety per cent of the tax for amounts paid to the State of California. On December 16, 1940 plaintiffs paid the further sum of \$13.08, representing interest and penalty upon the additional taxes thus assessed.

(5) That on the 22nd day of September, 1942, the plaintiffs filed a claim for refund of said additional taxes, together with interest and penalty, on the ground that the trustees were not employees within the meaning of Title [40] IX of the Act. A true and correct copy of

the claim is attached to the complaint in this action as "Exhibit A", and is hereby incorporated herein as if set out in full. That said claim was denied by the Commissioner of Internal Revenue in a letter dated July 12, 1943, and no part of the sum of \$60.48 has been refunded to the plaintiffs.

(6) That plaintiffs duly filed under the name of Bell View Oil Syndicate an original return on or before January 31, 1938, on Treasury Form 940 for the year 1937 for social security and unemployment taxes, and paid the tax thereon in the sum of \$70.69. That the Commissioner of Internal Revenue thereafter determined a deficiency as a result of his ruling that Craig C. Horton, Hooper C. Dunbar, and Gordon B. Morris, trustees of the trust, were employees thereof, whose remunerations were subject to the provisions of Title IX of the Social Security Act in the amount of \$618.00, together with interest and penalties. That the trustees and their remunerations in respect to which the deficiency was assessed are as follows:

<u>Trustee</u>	<u>Trustees' Fees 1937</u>
Craig C. Horton	\$12,500.00
Hooper C. Dunbar	10,700.00
Gordon B. Morris	7,700.00
Total	\$30,900.00

(7) That said amount of \$618.00, together with interest and penalties in the sum of \$99.79 was thereafter assessed. Plaintiffs thereupon filed an amended return for the year 1937, and on November 9, 1940, plaintiffs paid the sum of \$61.80, having taken credit of ninety per cent of the tax for amounts paid to the State of California. On December 16, 1940, plaintiffs paid the

further sum of \$3.79, representing interest and penalty upon the additional taxes thus assessed.

(8) That on the 22nd day of September, 1942, the plaintiffs filed a claim for refund of said additional taxes, together with interest and penalty, on the ground that the trustees were not employees within the meaning of Title IX of the Act. A true and correct copy of the claim is attached to the complaint in this action as "Exhibit B", and is hereby incorporated herein as if [41] set out in full. The said claim was denied by the Commissioner of Internal Revenue in a letter dated July 12, 1943, and no part of the sum of \$65.59 has been refunded to the plaintiffs.

(9) That plaintiffs duly filed under the name of Bell View Oil Syndicate an original return on Treasury Form 940 on or before January 31, 1939, for the year 1938 for social security and *employment* taxes and paid the tax thereon in the sum of \$96.13. That the Commissioner of Internal Revenue thereafter determined a deficiency as a result of his ruling that Craig C. Horton, Hooper C. Dunbar and Gordon B. Morris, trustees of the trust, were employees thereof, whose remunerations were subject to the provisions of Title IX of the Social Security Act in the amount of \$415.50, together with interest and penalties. That the trustees and their remunerations in respect to which the deficiency was assessed are as follows:

<u>Trustee</u>	<u>Trustees' Fees 1938</u>
Craig C. Horton	\$ 5,700.00
Hooper C. Dunbar	4,950.00
Gordon B. Morris	3,200.00
<hr/>	
Total	\$13,850.00

(10) That said amount of \$415.50, together with interest and penalty in the sum of \$43.12, was thereafter assessed. Plaintiffs thereupon filed an amended return on Treasury Form 940 for the year 1938, and on November 9, 1940 plaintiffs paid the sum of \$41.55, having taken credit of ninety per cent of the tax for amounts paid to the State of California. On December 16, 1940, plaintiffs paid the further sum of \$6.65, representing interest and penalty upon the additional tax thus assessed.

(11) That on the 22nd day of September, 1942, the plaintiffs filed a claim for refund of said additional taxes, together with interest and penalty, on the ground that the trustees were not employees within the meaning of Title IX of the Act. A true and correct copy of the claim is attached to the complaint in this action as "Exhibit C", and is hereby incorporated herein as if set out in full. The said claim was denied by the Commissioner of Internal Revenue in a letter dated July 12, 1943, and no part of the sum of \$48.20 has [42] been refunded to the plaintiffs.

(12) That plaintiffs duly filed under the name of Bell View Oil Syndicate an original return on or before January 31, 1940 on Treasury Form 940, for the year 1939 for social security and unemployment taxes and paid the tax thereon in the sum of \$89.11. That the Commissioner of Internal Revenue thereafter determined a deficiency as a result of his ruling that Craig C. Horton, Hooper C. Dunbar, and Gordon B. Morris, trustees of the trust, were employees thereof, whose remunerations were sub-

ject to the provisions of Title IX of the Social Security Act. That the trustees and their remunerations in respect to which the deficiency was assessed are as follows:

<u>Trustee</u>	<u>Trustees' Fees 1939</u>
Craig C. Horton	\$ 4,200.00
Hooper C. Dunbar	4,200.00
Gordon B. Morris	1,200.00
 Total	 \$9,600.00

(13) That plaintiffs thereupon on November 19, 1940, filed an amended return on Treasury Form 940 for the year 1939, and paid the sum of \$28.80, having taken credit of ninety per cent of the tax for amounts paid to the State of California. On February 11, 1941 plaintiffs paid the further sum of \$1.34 representing interest and penalty upon the additional tax thus assessed.

(14) That on September 22, 1942, the plaintiffs filed a claim for refund of said additional taxes, together with interest and penalty, on the ground that the trustees were not employees within the meaning of Title IX of the Act. A true and correct copy of the claim is attached to the complaint in this action as "Exhibit D", and is hereby incorporated herein as if set out in full. The said claim was denied by the Commissioner of Internal Revenue in a letter dated July 12, 1943, and no part of the sum of \$30.14 has been refunded to the plaintiffs.

(15) That the Bell View Oil Syndicate trust was organized under a written declaration of trust dated January 20, 1922, which was amended by a written declaration dated September 10, 1925, the effect of which was to

wholly [43] strike out from said declaration Articles Nine and Nineteen and to reduce the par value of units of beneficial interest in the trust from \$100.00 to \$10.00 and to increase their number from 5,000 to 50,000. A true and correct copy of said original declaration of trust dated January 20, 1922 is attached hereto as "Exhibit E".

Dated November 16, 1944.

A. CALDER MACKAY,
ARTHUR McGREGOR,
HOWARD W. REYNOLDS,
By ARTHUR McGREGOR
Attorneys for Plaintiffs
CHARLES H. CARR,
United States District Attorney,
EDWARD H. MITCHELL.
Assistant United States District Attorney
By EUGENE HARPOLE
Attorneys for Defendant [44]

[EXHIBIT E.]

DECLARATION OF TRUST

Know All Men by These Presents: That the trust estate created herein shall be designated by the name of and shall be known as

BELL VIEW OIL SYNDICATE

and that

Whereas, H. W. McFarlane, of the County of Los Angeles State of California, has heretofore sold, assigned, transferred, and conveyed unto C. C. Horton, W. A. Roberts, Phil Grohs, H. W. McFarlane and Hooper C. Dunbar, hereinafter designated as trustees, oil and gas leases

on that parcel and piece of real property more particularly described as follows:

Lot 5, Block 82, in Santa Fe Springs, as recorded in Book 76, Page 37, et seq., miscellaneous records of Los Angeles County, California:

It Is Hereby Expressly Understood and Agreed, that the said trustees have accepted, received and will hold, such rights, titles, interests and estates as have been assigned and conveyed to them and by them acquired under the above mentioned assignment and conveyance, in trust, nevertheless, for the uses and purposes set forth in this declaration of trust, to-wit:

Trust Created:

First: The said trustees, or their successors, shall hold all the funds and property of said trust estate now or hereafter coming into their possession, for the purposes, with the powers, and subject to the limitations herein declared; and it is hereby expressly declared that a trust and not a partnership or corporation is hereby created: and the *the Bell View Oil Syndicate*, is a trust and not a partnership or a corporation.

The principal place of business and office of said trust estate, and of the trustees, shall be in the City of [46] Los Angeles, State of California.

Exhibit "A"

Trust Estate and Property:

Second: It is an express condition of this trust that the trust estate and property are, and shall be, only such rights, titles, estates and interests as said trustees may have received under said assignment and conveyance, or shall hereafter acquired subject to this trust, and the

trustees are not, and shall not be responsible or assume any liability for the nature, value or extent of the title to any of the property hereinbefore described and accepted in trust hereunder, or that may hereafter be added to this trust as hereinbefore provided, nor for any adverse or conflicting claims or interests therein of any persons.

Duties of Trustees:

Third: During the term of this trust, said trustees out of the moneys subject to this trust, whether principal or income therefrom, shall drill or cause to be drilled on the above described premises, a well, or wells, for oil to a depth of four thousand feet unless oil in paying quantity be found at a lesser depth; and pay, or cause to be paid from such moneys, the entire expense of drilling and equipping said well, or wells, including all rigging, casing, pipe and other material and all labor, fuel, and water, and assume all responsibility and liability incident to said operation, subject to the limitations herein set forth. And when oil shall be found in paying quantity in the said well, or wells, such well, or wells, will be completed and shut in with all necessary fittings and equipment and connected with pipe lines for marketing of oil therefrom; and from such moneys, subject to this trust, said trustees shall erect necessary derricks, buildings, and other structures and procure necessary machinery and procure reasonable insurance upon all insurable property [47] owned by them on the trust estate and shall pay or secure the payment of all liens, encumbrances, taxes, assessments or other charges against said property, properly chargeable to the trustees and necessary to protect their title to the trust estate, for the purpose of this trust; but in the event that said trustees shall not have such funds available and of

sufficient amount to fully pay for such charges and expenses, or any operations required of them herein, neither said trustees nor any unitholder shall be liable in any event, amount or degree, or to any person for any loss or damage suffered by reason thereof, to the trust estate or to any unitholder of this trust or to any other person whomsoever.

Powers of Trustees:

Fourth: The trustees, in the name of the Bell View Oil Syndicate, shall have full power, except as herein limited, to develop, operate, sell and deal in petroleum, oil properties and wells, and to buy, acquire, construct, maintain, operate pipe lines, and deal in machinery, implements, tools, conveniences of all kinds capable of being used in connection with oil, gas or other utilities. The execution of all contracts, of all conveyances and transfers and of all other instruments relating to the trust fund or any part thereof, by or pursuant to the authorization of a majority of the said trustees, or their successors, shall always be sufficient.

The trustees hereunder and their successors, shall have and exercise the exclusive management and control of the trust estate; they may adopt and use a common seal, collect, sue for, receive and receipt for all sums of money at any time coming due, to said trust; may employ counsel to begin, prosecute, defend or settle suits at law, in equity, or otherwise, and to compromise or refer to arbitration, any claims in favor of or against the [48] trust.

During the term of this trust and to enable them to properly execute the same according to the terms, provisions and intentions hereof, the trustees shall have full power to hold or convey, grant, bargain, sell, lease for

terms, to repair any improvements thereon or therein of such character, amount, costs, and from such funds or property, subject to this trust as they may deem advisable; and to drill, operate for develop and remove petroleum, oil, naptha, natural gas, asphaltum or other kindred substances in and from the real property described hereinabove, or any other property which may be acquired by said trustees; and generally in all respects to manage, handle, develop and dispose of the whole or any part of the trust estate in conformity with the terms of this trust; said trustees are hereby vested with the sole power and discretion to discern what will constitute principal and what will constitute gross income therefrom and net income available for payment or distribution under the terms of this trust, provided, however, that not to exceed ten (10) per cent of all moneys received by the trustees shall be used to defray office expenses, officers' salaries and all overhead expenses.

Liability of Trustees and Unitholders:

Fifth: The trustees shall have no power to bind the unitholders personally, otherwise than as hereinbefore provided and the unitholders and their assigns and all persons and corporations extending credit or contracting with or having any claim against the trustees shall look only to the funds or property of the trust for payment under such contract or claim, or for payment of any debt, damage, judgment or decree, or of any money that may otherwise become due or payable from them to the trustees so that neither the trustees nor the unitholders, present or future, shall be personally liable therefore, and neither the trustees, nor any of them, shall ever be personally liable hereunder [49] as partners, or otherwise; but for all debts the trustees shall be liable only to the

extent of the trust funds or property held by them. In every written order, contract or obligation which the trustees shall give or enter into, it shall be the duty of the trustees to stipulate that neither the trustees nor the unit-holders or their successors shall be held to any personal liability under or by reason of any order, contract or obligation.

The trustees shall not be liable for errors of judgment either in holding the property originally conveyed to them or in acquiring and afterward holding additional property, nor for any loss arising out of any investment, nor for any act performed or omitted by them in the execution of this trust in good faith; nor shall they be liable for the acts or omissions of each other, or any officer, agent, or servant appointed by or acting for them; and they shall not be obligated to give any bond to secure the due performance of this trust by them. No assessment shall ever be made upon the unitholders or their assigns.

Number of Trustees and Vacancies:

Sixth: Any vacancy occasioned by the death or resignation or refusal to act of any trustee may be filled by the remaining trustees, and the trustee or trustees so appointed shall have the same powers, duties and liabilities as the original trustees hereunder. Upon resignation, decease, incapacity, or removal, or vacancy for any cause, the title of the outgoing trustee, or trustees, shall rest in the remaining trustees, and upon the filling of any vacancy by the remaining trustees, as aforesaid, the title of the whole trust property shall rest in all the trustees whether appointed hereunder or by the remaining trustees to fill vacancies, as hereinbefore provided.

Units in Trust Estate:

Seventh: The trust estate consists of five thousand equal and undivided interests, which undivided interests are [50] herein referred to as "units", of the nominal, or par value of \$100.00 each; and the owners of the undivided interests, or units, of the trust estate, and their assigns and grantees, are herein designated as "unitholders". The units in said trust estate are undivided and indivisible and the holders and owners of the said units have no right of partition or segregation or dissolution either in law or in equity; and the trust estate shall be managed and controlled as an entirety and for the benefit of all the unitholders according to the number of units held by each and as herein set forth.

In consideration of the sale, transfer, assignment and conveyance by the said H. W. McFarlane, of the said leases hereinbefore referred to, to the trustees hereunder, it is mutually understood and agreed, that the said H. W. McFarlane is now the owner of 1000 units in the trust estate hereby created and the said trustees have and do hereby agree to issue to the said H. W. McFarlane or his order, transferable certificates for said 1000 units in the said trust estate.

Sale of Units and Certificates:

Eighth: In addition to the said 1000 units to be issued to the said H. W. McFarlane, in consideration for the transfer, sale, assignment and conveyance of the leases hereinbefore referred to, the trustees shall issue and sell at public or private sale, upon such terms and for such prices as they may deem expedient, such additional units as may be necessary to provide means for the prosecution and furtherance of the objects of this trust and to

defray the costs and expenses thereof, subject, however, to the approval of the Commissioner of Corporations or other proper officers to the State of California.

In the case of a loss or destruction of any certificates for units issued by the trustees, the trustees may, under such conditions as they may deem expedient, issue a new certificate or certificates in the place of one lost or destroyed. [51]

As evidence of the ownership of said units, the trustees shall cause to be issued to each unitholder, a transferable certificate or certificates, which certificates shall be in the form following, to-wit:

Number:

Units:

BELL-VIEW OIL SYNDICATE

Los Angeles, California.

Capital — \$500,000.00

This Is to Certify That
is the owner of units fully paid
and nonassessable, of the par value of One Hundred
(\$100.00) Dollars each, of the beneficial interest in the
Bell-View Oil Syndicate, a business trust, transferable
only on the books of the company by the owner thereof in
person or by duly authorized attorney upon surrender of
this certificate properly endorsed.

This certificate is held subject to an Agreement and
Declaration of Trust, dated January, 1922, and
which is recorded in the office of the County Recorder
of Los Angeles, California, and which is hereby referred
to and made a part of this certificate.

Said Declaration of Trust provides:

That the trustees shall declare a dividend each three months of not less than sixty percent of the net income derived from the operations of said properties and from the sale of oil therefrom, and

That not to exceed ten (10) percent of all moneys received shall be set aside to defray office and other overhead expenses, and

That no unitholder shall ever be personally liable for any debt, covenants, demands, contracts or torts of any kind of this company.

Witness, the signatures of the trustees of said company this day of, A. D. 19.....

BELL-VIEW OIL SYNDICATE

By

President of the Board

Attest:

Secretary of the Board.

Dividends:

Ninth: The trustees shall quarterly declare dividends out of the net earnings or profits of said trust, which said [52] dividends shall dispose of all the net earnings or profits of said trust, less the ten (10%) per cent of said net earnings or profits herein provided to take care of overhead, said dividends on all of the net earnings to continue to be declared quarterly until there has been paid back to the unitholders, by way of dividends, an amount equal to the total cost of drilling the first well; when said total cost of drilling the first well has been so paid, there-

after the trust shall quarterly declare dividends of not less than sixty (60%) per cent of the net earnings or profits of said trust, the balance of said net earnings not otherwise used for overhead expenses as herein provided, to be used at the discretion of the Board of Trustees for the development of future acquired properties. If, after said sixty (60) per cent dividends on the net earnings be declared and the balance of the moneys remaining in the hands of the trustees are not used within six (6) months from the date of declaration of said dividend for future development work then, and in that event, the balance so remaining shall immediately, without any request from any unitholder, be declared in the form of an extra dividend and distributed to unitholders.

Meetings of Trustees and By-Laws:

Tenth: Meetings of the trustees shall be held from time to time upon the call of the president or any three of the trustees. A majority of the trustees shall constitute a quorum, but in no event can any meeting of said trustees be held, nor any business transacted binding upon this trust unless, and until all of the trustees herein named shall first have received written notice of said meeting; the concurrence of all the trustees shall not be necessary to the validity of any action taken by them, but the wish of a majority of the trustees present and voting at any meeting shall be conclusive unless in this declaration of trust specifically provided otherwise. The trustees may make, adopt, amend or repeal such by-laws, rules and regulations, not [53] inconsistent with the terms of this instrument, as they may deem necessary or desirable for the conduct of their business and for the government of themselves and their agents, servants and representatives.

Officers:

Eleventh: The trustees shall annually elect from among their number a president and vice-president, and shall also annually elect a treasurer and secretary, and they shall have authority to appoint such other officers, agents and attorneys *and* they may from time to time deem necessary or expedient for the conduct of their business. They shall have authority to remove any and all officers, agents and employees at their pleasure; to accept resignations and to fill any vacancy occurring in the office of President, Vice-President, Treasurer, or Secretary, for the unexpired term, and shall likewise have authority to elect temporary officers to serve during the absence or disability of the regular officers. The president, vice-president, treasurer and secretary shall have such authority and perform such duties as may from time to time be determined by the trustees. The trustees shall fix the compensation of any and all officers and agents whom they may appoint or employ and are likewise authorized to pay to themselves such compensation for their own services as they may deem reasonable, but in no event shall said total compensation exceed the ten (10%) per cent limitation herein set forth in this contract.

Twelfth: The trustees shall call meetings of the unit-holders, annually, on the third Wednesday of March, and shall prepare and submit to the unitholders at such meeting, a full report of their operation including moneys received and disbursed for the year ending on the 31st day of January, preceding. They may also call special meetings of the unitholders at any time. [54]

Notice of Meetings:

Thirteenth: Notice of annual and special meetings shall be deemed binding upon each of the unitholders if mailed,

prepaid, to the last address given by him, to the trustees, or in default thereof, to his last business place or abode. Notices of meetings shall be given five (5) days beforehand and may be given by advertisement for three (3) successive days in a paper of general circulation published in the City of Los Angeles, County of Los Angeles, State of California, the last publication to be at least five (5) days before the date of the meeting, or may be mailed, at the option of the trustees. In notices of special meetings, the purpose thereof shall be stated.

Voting:

Fourteenth: Unitholders may vote by proxy at any annual or special meeting called by the trustees, and a majority of the unitholders present may decide all questions at such meetings, the holders of fifty per cent of the units, or their proxies, constituting a quorum.

Fifteenth: The trustees shall keep a book for the recording therein of the names and addresses of unit-holders and of the sales and transfers of units. No sale or transfer of any unit in said trust estate shall be valid or binding on said trustees, or their successors, until the purchaser or the transferee shall have notified the trustees in writing of the said purchase and shall have, also in writing, accepted, consented to, approved, ratified and confirmed all of the terms, conditions and provisions of this declaration of trust, except where such interest may pass or be transferred by decree, order or judgment of a court of competent jurisdiction, and then only upon proof satisfactory to the trustees of the regularity and validity of the proceedings in such matter being presented to the trustees: and in all cases of transfer of units, the trustees may require [55] proof satisfactory to themselves of the title of the claimant as owner of the units.

Effect of Death of Trustees or Unitholders:

Sixteenth: The death of a unitholder or trustee during the continuance of this trust shall not operate to determine the trust, nor shall it entitle the legal representatives of the deceased unitholder to an accounting or to take any action in the courts or elsewhere, against the trustees, but the executors, administrators or assigns of any deceased unitholder shall succeed to the rights of said decedent under this trust upon surrender of the certificate or certificates, for the units owned by him.

Amendment of Declaration:

Seventeenth: The trustees may, with the consent of the holders of two-thirds of the outstanding units of the trust estate, alter or amend this declaration or terminate this trust or transfer the trust property to a person or persons, or a duly organized corporation.

Duration of Trust:

Eighteenth: This trust shall endure and continue until the expiration of twenty (20) years from the date hereof, and may then, or at any time prior thereto, be terminated, or may then be continued by a two-thirds (2/3) majority of the votes of units then outstanding. The trustees shall not be required to give bond, and each shall be liable only for his own acts and then only for wilful breach of trust. Upon termination of the trust hereby created, the trustees shall liquidate the trust estate and divide the remaining assets among the unitholders in proportion to their respective interests, or shall convey the whole of the trust estate subject to all then existing

assessments, encumbrances, or other matters affecting title to the unitholders therein entitled to take the same under the terms hereof; provided, however, that first all the charges and expenses therein due the trustees hereunder shall be fully paid and said trustees [56] shall be fully relieved and discharged from all then existing and future obligations, and liabilities.

Nineteenth: None of the powers in paragraph four (4) in this Agreement set out, shall be construed as authorizing the trustee, without the consent of a majority of the units represented at a regularly called meeting of the unitholders, from acquiring new properties or leases, or from disposing of the whole or any part of the capital, or assets, or other properties of this trust, either in whole or in part, it being the specific intention of this paragraph to compel said trustee to secure the approval and ratification of the majority of the units represented at any regularly called meeting before disposing of the properties above listed, or acquiring new properties on behalf of the trust.

In Witness Whereof, the parties have hereunto subscribed their names at the City of Los Angeles, County of Los Angeles, State of California, on this 20th day of January, 1922.

C. C. HORTON

W. A. ROBERTS

H. W. McFARLANE

PHILIP A. GROHS

HOOPER C. DUNBAR

[Endorsed]: Filed Nov. 16, 1944. [57]

[Title of District Court and Cause.]

STATEMENT OF TESTIMONY

Hooper C. Dunbar, one of the plaintiffs called as a witness on behalf of the plaintiffs, having been first duly sworn, testified upon direct examination as follows:

My name is Hooper C. Dunbar. My address is 436 North Maple Drive, Beverly Hills. I am one of the three trustees operating under the trust indenture dated January 20, 1922 for Bell View Oil Syndicate. I know of the duties and activities of the three trustees. The other two trustees are C. C. Horton and G. B. Morris. We operated the oil property at Santa Fe Springs, produced the oil and disposed of it, and did such other work as is incidental thereto, from that property on which we drilled certain oil wells. There were six wells drilled. We have title to other property. We always take title as Hooper C. Dunbar, G. B. Morris and C. C. Horton, as trustees for the Bell View Oil Syndicate, an unincorporated trust estate. Our regular meeting is every Tuesday morning, and then we have other meetings. We maintain our office in the Richfield Building [58] at Sixth and Flower. We have an annual meeting of the unit holders, called because the trust agreement provides that an annual meeting for unit holders be called and a statement of receipts and disbursements submitted to them. There is no provision for any other matters at the annual meeting. Some of the unit holders attend these meetings. We have about 400 unit holders and there have probably never been more than six or seven attend the annual meeting. The trustees have never adopted any by-laws. None of the trustees have ever been discharged. They have been reduced to three instead of five by death. Five were

originally provided for. It is permissive as to whether a successor be appointed. If so, the appointments would be made by the remaining trustees. The participating unit holders voted on the amendment of the trust agreement. It is provided in the trust agreement that they have a right to vote if the trust agreement is amended. The participating unit holders have a right to vote if they amend the trust agreement, but only on an amendment. There have been two amendments. I am not sure whether the taxes have been paid. I would refer it to our tax counsel, Mr. McGregor. We carry our own bank account for the money received under the trust in the names of the three trustees. It requires the signatures of three trustees upon our checks for disbursements. In our correspondence with the Bell View Oil Syndicate, we sign our letters as trustees. Our law suits are conducted in the trustee's names. We are sued as trustees for the Syndicate, and we sue as trustees for the Syndicate. We execute contracts as trustees. We execute contracts for the sale of oil as trustees for the Bell View Oil Syndicate. That is, we name the individuals as trustees for the Bell View Oil Syndicate. The trust agreement provides a limitation of 10% of the gross upon our compensation, so we have to consider what the gross return is first, and including trustees' compensation and all other overhead, it must not exceed the 10% provided therein. Then the Supreme Court, in a case, has also said that it must be reasonable within those limitations, that is, the Supreme Court of California. That was in a declaratory relief action, brought by the trustee against the unit holders to determine and obtain [59] a clearance on their acts, and it was carried to the Supreme Court. It was in that case.

We pay no salary or other compensation to the trustees and officers. We do have officers. They are: President, Vice-President, Secretary and Treasurer. We elect those officers once a year. No powers have ever been delegated to any of these officers. All contracts are signed by the three of us. All instruments executed on behalf of the trustees or the syndicate, with the exception of letters, are signed by all three of us. The tax returns are signed the way they are prepared for us by tax counsel. The Government I believe, requires two signatures, two officers or two trustees. I believe we have signed them apparently at different times, but however they prepare them.

The 1939 federal income tax Form 1120 is signed by C. C. Horton, Secretary-Treasurer. It bears the signature of G. B. Morris and C. C. Horton. They acknowledged it as the return under Horton's signature, the said Secretary, or Secretary-Treasurer. Underneath Mr. Morris' signature, there is printed on the return, "President or other principal officer". There is no place on the form for any trustees to sign. The claim for refund has never been signed or transferred. We have never had any action or claim or other proceedings to collect this refund that I know of. The trustee never adopted any by-laws. The trustees never elected any directors or unit holders, or stockholders as officers. They never employed or appointed any officer as such. The trustee exercised no control over any of the unit holders. As a trustee, I am a unit holder. The unit holders never exercised any control over any of the trustees or the trust assets. The three trustees formulated policies in dealing with the trust property.

Upon cross examination, Mr. Dunbar testified as follows:

We are required under the trust agreement to publish a notice of the annual meeting, fixing a time and place which has almost always, with one exception, been in our place of business, our office. At that time there may be two or three, I think one time as many as six unit hold- [60] ers would come up to receive a statement of receipts and disbursements, which we are required to furnish the unit holders annually. We do not state in the notice sent to the unit holders, what is to be said or done at the annual meeting. Frequently there is discussion at the annual meeting and questions asked about future plans. The statement is passed out. Trustee Horton usually passes them out to those present, and then discusses certain points in them. Sometimes the meetings will last ten or fifteen minutes, sometimes a little longer. We mail to all the other unit holders who have not attended, a statement of receipts and disbursements. We record those who attend the annual meeting as a matter of record. I think sometimes that some mention is made of the motions the unit holders bring up for discussion in connection with the statements rendered in the report of the meeting. The trustees do not subsequently take action upon the matters that are discussed by the unit holders at these meetings. The unit holder has no power to instruct the trustees as to what to do. We may consider suggestions that are made, and if we think they are good, act favorably on them. We are not required to.

Of the 300,000 outstanding capital, I doubt very much if there has been one percent of it attend an annual meeting—a very small attendance. I account for that because there isn't anything that the unit holder can do. We have

paid them at least 1000% on the original money invested. There are 30,000 units outstanding in this Syndicate, of a par value of \$10.00 each. I wouldn't know how many of these outstanding units are held by the three trustees without consulting the books. I hold something over 3,000. I hold a little more than 10% of the outstanding units. I think Mr. Morris holds about 10% and Mr. Horton a little less I believe. That is only my personal opinion. Originally 7500 units were owned by the five trustees. There were approximately 20,000 units outstanding at the time and approximately 7500 of them were in the hands of the trustees.

The selection of our tax counsel was with the consent and approval of the three trustees. The trustees have an official seal. We put the official seal on our stock certificates or unit certificates, rather. I [61] think when the bank has asked for it we have put it on the bank account agreement, or signature card. At the present time I am President, Mr. Morris is Vice-President, and Mr. Horton is Secretary-Treasurer of the Bell View Oil Syndicate. That was the roster of officers during the years of 1936, 1937, 1938 and 1939. The trustees have elected the same officers for those years, and the officers are always elected from the membership of the trustees. The citation of the California Supreme Court case that I spoke of is: Dunbar, et al. - v - Anderson, et al., as I recall it. Mr. Anderson was one of the unit holders, the first one alphabetically on the list. The trustees started it. We asked the Court for declaratory relief. I do not recall that a

deduction was claimed on the Bell View Oil Syndicate's 1939 corporate income and excess profits tax return for the compensation of its officers.

I do not have any other occupation, profession or employment that I followed during any of the years 1936, 1937, 1938 and 1939, aside from being the trustee of the Bell View Oil Syndicate. I devoted whatever time I thought was necessary to the affairs of this trust.

Dated: this 15th day of March, 1945.

It is hereby stipulated by and between counsel for the appellant and appellee that the above entitled statement of evidence may be considered part of the record on appeal.

CHARLES H. CARR,
United States Attorney,

E. H. MITCHELL,

Asst. United States Attorney

GEORGE M. BRYANT,

Asst. United States Attorney

EUGENE HARPOLE,

Special Attorney, Bureau of Internal Revenue

By EUGENE HARPOLE

Attorneys for Defendant-appellant.

MACKAY, McGREGOR AND
REYNOLDS

By ARTHUR McGREGOR

Attorneys for Plaintiff-appellee

[Endorsed]: Filed Mar. 30, 1945. [62]

[PLAINTIFFS' EXHIBIT NO. 1.]

TREASURY DEPARTMENT

Washington 25

Jul 12 1943

[Crest]

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to

A&C:A:AA:4-LGB

CI-760953, et al.

Bell View Oil Syndicate,

555 South Flower Street,
Los Angeles, California.

Sirs:

Reference is made to Bureau letter of February 12, 1943, relative to your claims for refund of tax, together with penalty and interest involved, imposed under the provisions of Title IX of the Social Security Act and the Federal Unemployment Tax Act for the years and in the amounts shown below:

Claim Number	Period	Amount Claimed
760953	1936	\$60.48 tax, penalty, and interest
760952	1937	\$65.59 tax, penalty, and interest
760954	1938	\$48.20 tax, penalty, and interest
760955	1939	\$30.14 tax and interest

The basis of the claims is that the three trustees, who were held in Bureau letter of September 24, 1940, to be

your employees for the purposes of the Federal tax, should not be so considered and that you are not subject to the tax, together with penalty and interest involved, which you have paid with respect to the remuneration of those individuals. In the letter of February 12, 1943, you were advised that when a decision had been rendered concerning the question involved, you would be further informed and your claims would be adjusted.

In a letter dated September 21, 1942, from Mackay, McGregor and Reynolds, 1235 Pacific Mutual Building, Los Angeles, California, it is stated that the facts which existed in your case are substantially the same as those in the case of United States v. Griswold, et al (C. C. A. 1st, 1941) 124 F. (2d) 599, and it is urged that your claims be allowed on this basis.

In the reply of this office dated June 17, 1943, this firm was advised that the general position of the Bureau with respect to the status, for [63] employment tax purposes, of the trustees or other fiduciaries of a business trust or association who are engaged in conducting its affairs and who occupy positions analagous to those of officers of a corporation is expressed in S. S. T. 284, C. B. 1938-1, page 474; that it is true that the determinations of the Circuit Court of Appeals in the case of United States v. Griswold, et al. (C. C. A. 1st, 1941) 124 F. (2d) 599, are contrary to such general position; but that, in view of the provisions of the statute involved, the Bureau does not feel warranted in reversing its general position on the basis of the decision in that particular case.

This firm was advised further that, considering the facts presented in your claims in the light of the general position of the Bureau, it would be necessary to adjust

the claims in accordance with the ruling previously made to you. In accordance with the above, you are liable for payment of tax, penalty, and interest in the amounts of your claims and the claims are disallowed.

This notice of disallowance is sent to you by registered mail in accordance with the provisions of Section 3772(a) (2) of the Internal Revenue Code.

An examination of your original and amended returns, Form 940, for the year 1939, indicates an increase in tax as set forth below:

	Shown by Amended Return	Revised
Taxable wages	\$39,301.65	\$39,301.65
Tax, 3% of wages	1,179.05	1,179.05
Less credit for contributions paid into the State fund	1,061.14	1,035.22
	<hr/>	<hr/>
Balance of tax	\$ 117.91	\$ 143.83
Less tax previously assessed		117.91
	<hr/>	<hr/>
Additional tax due		\$ 25.92

In accordance with the provisions of Section 1601 (a) (3) of the Federal Unemployment Tax Act, credit for required contributions, with respect to the years 1939 and 1940, paid on or before the due date of the return, is allowable to the extent of ninety per cent of the Federal tax. This section also provides that credit for required contributions, with respect to the years 1939 and 1940, paid after the due date, is limited to ninety [64] per cent of the amount which would have been allowable on account of such contributions had they been paid on or before such due date. Under Section 701 of the Revenue Act of 1941, credit may also be allowed for contributions paid after June 30 next following the due date of the re-

turn but before November 19, 1941, but such credit is limited to ninety per cent of the amount which would have been allowable on account of such contributions had they been paid on or before the due date of the Federal return.

Credit for contributions under the provisions of Section 701 may be allowed only if claimed before March 21, 1942.

Information from the State of California shows that contributions of \$801.94 for the year 1939 were paid on or before January 31, 1940, and that an additional payment of \$259.20 was made on December 7, 1940.

In accordance with the above provisions, credit of \$1,035.22 only is allowable against the Federal tax of \$1,179.05 for contributions paid. The credit of \$1,035.22 represents the contributions of \$801.94 and ninety per cent of the contributions of \$259.80.

The additional tax of \$25.92 for the year 1939, together with interest, is being assessed and reported to the office of the Collector of Internal Revenue, Los Angeles, California, which will issue notice and demand therefor. Payment should then be made to the office of the collector and not to this office.

Respectfully,

Guy T. Helvering.

Commissioner.

By Geo. Schoeneman

Deputy Commissioner.

Case No. 3259-PH. Dunbar vs. U. S. A. Plfs. Exhibit #1. Date No. 21, 1944 in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk. [65]

[PLAINTIFFS' EXHIBIT NO. 4.]

BELLVIEW OIL SYNDICATE

No. 16442

526 Richfield Bldg.

555 So. Flower St.

Los Angeles, Calif.

[Stamped]: Paid

Los Angeles, Calif. September 10, 1936

Pay to the

Order of C. C. Horton \$1,500.00

Fifteen Hundred Dollars

1 - Head Office - 16-11

Citizens National Bank

Trust & Savings

of Los Angeles

Spring Street at Fifth

Los Angeles, California

BELL VIEW OIL SYNDICATE

Hooper C. Dunbar

Trustee

G. B. Morris

Trustee

This Check Will Not Be Honored if Voucher Is Detached
1936 In Full Payment of Account as Stated Below:

Sept. 10 Trustees' compensation 1.500 00

[Stamped]: Paid

Case No. 3259-PH. Dunbar vs. U. S. A. Plfs. Exhibit #4 Date Nov. 21, 1944 in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. J. M. Horn, Deputy Clerk [66]

#5

Case No. 3259-PH

Dunbar vs USA

Pls. EXHIBIT 5

Date, NOV 21 1944 No. 5 IDENT 10 T.V.

Date NOV 21 1944 No. 5 IN EVID.

Clerk, U. S. District Court, Sou. Dist. of Cal.

Deputy Clerk.

J. M. Johnson

U. S. GOVERNMENT
DEPARTMENT OF REVENUE & SERVICE
ANNUAL RETURN OF EXCISE TAX ON EMPLOYERS OF EIGHT OR MORE INDIVIDUALS
UNDER TITLE IX OF THE SOCIAL SECURITY ACT

NOV - 1944

FOR CALENDAR YEAR 1936

NOV - 1944

FILE THIS RETURN WITH THE COLLECTOR OF INTERNAL REVENUE FOR YOUR
DISTRICT NOT LATER THAN JANUARY 31, 1937

READ INSTRUCTIONS CAREFULLY

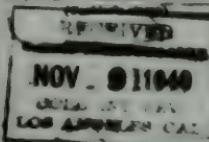
PRINT NAME AND ADDRESS

Do not write in this space

Number _____

Amount _____

Paid \$ _____



all equal

Name _____
Street and number or name of house _____
Post office _____ County _____ State _____

are of business in detail - Instruction 4)

(Check one) Form of organization Corporation Partnership Individual Estate or trust.

Total wages paid or payable for the calendar year. (See instructions on reverse side)

Total wages paid or payable for—

(a) Services performed outside the United States

(b) Agricultural labor

(c) Domestic service

(d) Service of an officer or member of the crew of a vessel in the
waters of the United States

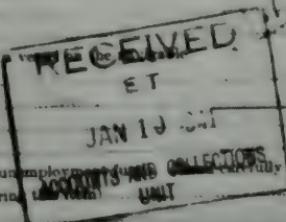
(e) Family employment

Total wages subject to tax (Item 1 minus Item 2)

Tax (1% of Item 3)

Less: Credit for contributions actually paid into State unemployment compensation fund (See instructions on reverse side under Schedule B before entering)

Balance of tax (Item 4 minus Item 5)

Feb 27
Jan. Oct 2 00/40L 104472

I/we swear (or affirm) that this return, including any accompanying schedules or statements, is a true, correct, and complete statement, made in good faith, for the calendar year stated, pursuant to Title IX of the Social Security Act and Regulations thereunder and that no portion of the credit claimed in Item 8 above is with respect to a contribution made to any State unemployment compensation fund or to money deducted from the wages of individuals in my/our employ for such service performed outside the United States as outlined in Instruction 9, or for excepted service as outlined in Instruction 10, nor is there any offset of such credit with respect to money deducted or to be deducted from the wages of individuals in my/our employ.

Signed or acknowledged before—

(Name)

(Address)

[CORP.
SEAL]

Name _____

Title _____

(Address)

Name _____

Title _____

Return to be and is submitted to me this 29 day of October, 1944.

H. J. O'Dell
J. M. Johnson

Miss P. Rabbleday 68
Notary Public in and for the State of California

SCHEDULE B

Information concerning the tax on contributions is enclosed in Item 5 of the return for contributions made to any States other than the State in which the form officer or principal place of business of the taxpayer.

credit allowable. Taxpayer may credit against the tax the total amount of his contributions for services performed during the calendar year under State laws approved by the Social Security Board; provided, that no credit may be taken for a contribution if a State in which State has not been duly certified, for the calendar year for which the tax is due, to the Secretary of the Treasury by the Social Security Board. The total credit allowed to any taxpayer for such contribution shall not in any case exceed 60 per centum of the tax at which credit is applied. The contribution must have been actually paid into the State unemployment fund before the date on which the return is required to be filed.

Information concerning amounts payments required by a State law to be made by an employer into an unemployment fund to the extent that such payments are made by him without any part thereof being deducted or deductible from the wages of individuals in employment. Payment not excepted is outlined in Instruction 10.

refund of credit. Credit against the tax for contributions paid into State unemployment funds will be allowed only upon presentation of a certificate of the proper officer of each State, the law of which required contributions to be made) on the form provided for that purpose. Such certificates will be forwarded direct to the Commissioner of Internal Revenue by the State officer and will be retained by the individual retiree of the employee in due course of time. The Commissioner may require such other or additional proof as he may deem necessary to establish the right to the credit.

TOTAL WAGES PAID OR PAYABLE

Every person subject to tax under the Social Security Act shall keep such permanent records as are necessary to establish:
1. Total amount of compensation payable to his employees in cash in a medium other than cash, showing separately, (a) total compensation payable with respect to services excepted (Instruction 10), (b) total compensation payable with respect to services performed in the United States; Instruction 9, (c) total compensation payable with respect to all other services. (2) the amount of compensation paid into the State unemployment fund and with respect to services during the calendar year, not including excepted services, (Instruction 10), showing separately, (a) payments made and not deducted (or to be deducted) from the remuneration of employees (including wage deduction or to be deducted) from the remuneration of employees, and also the amount of contributions made by the employer into the State unemployment fund with respect to excepted services, (3) the information required to be shown on the return, (a) the extent to which such person is liable for the tax.
2. All records should be maintained in such manner as to permit a comparison or reconciliation of the amounts reported for wages payable payable with the deductions allowable on the income-tax return of the employer for the corresponding period for the same items.

BELLVIEW OIL SYNDICATEPaper to be Attached to Form 240Annual Return of Excise Tax on
Employers of 5 or more IndividualsFor the Calendar Years1936 to 1939, inclusive

Amended returns for the above trust have been made necessary by reason of a ruling made by the Bureau of Internal Revenue that the trustees of this trust estate have been determined to be employees of said trust. (See Deputy Commissioner Leo J. Schaefferman's letter of October 16, 1940, symbols ATC; 2A4; LTR covering the year 1938 and letter from the same deputy commissioner dated September 24, 1940 bearing symbols ATC; A; A4; LGR, covering the years 1936 and 1937, denying taxpayer's contention that the three trustees, J. B. Morris, Hooper C. Dunbar and C. C. Norton, are employers and not employees of this trust. The additional tax shown on this return results from taxing the amounts paid to these three trustees shown as follows:

	<u>1936</u>	<u>1937</u>	<u>1938</u>	<u>1939</u>
Hooper C. Dunbar	\$16,200.00	\$10,700.00	\$ 4,950.00	\$ 4,200.00
J. B. Morris	13,200.00	7,700.00	3,200.00	1,200.00
C. C. Norton	<u>18,000.00</u>	<u>12,500.00</u>	<u>5,700.00</u>	<u>4,200.00</u>
	<u>47,400.00</u>	<u>30,900.00</u>	<u>13,850.00</u>	<u>9,600.00</u>
Tax Rate	<u>0.1%</u>	<u>0.2%</u>	<u>0.3%</u>	<u>0.3%</u>
Additional Tax	<u>\$ 47.40</u>	<u>\$ 61.80</u>	<u>\$ 41.55</u>	<u>\$ 28.80</u>

Taxpayer respectfully requests that the additional tax shown herein be accepted without interest or penalty, by reason of the exigencies indicated above.

B-4

UNITED STATES
CORPORATION INCOME AND EXCESS-PROFITS TAX RETURN

FIELD

939

For corporations having total receipts of not more than \$350,000 and a net income of not more than \$25,000 or no net income
(except certain corporations specified in Instruction 2)

For Calendar Year 1939

or fiscal year beginning 1939, and ended 1940

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

201.81

3622

118
881064Post
Box
Solid
No.
District
(Circle if known)

23809

712(1)
C

May 520204 1943

ADJUSTED NET INCOME COMPUTATION

Item No. May 13 1943 MAI 22-1013 INCOME

- Gross sales (where inventories are an income-determining factor) 8. and allowances 8.
- Less cost of goods sold (from Schedule B-1) 21
- Gross profit from sales (Item 1 minus item 2) 27 665 60
- Gross receipts (where inventories are not an income-determining factor) 27 566 21
- Less cost of operations (from Schedule B-2) 27 465 60
- Gross profit where inventories are not an income-determining factor (Item 4 minus 5) 52 281 21
- Interest on obligations of the United States (from Schedule A, line 10 (e) (4)). (See Instruction 18-(1)) 21
- Rents. (See Instruction 19) 21
- Royalties. (See Instruction 20) 21
- (a) Capital gain (or loss) (from Schedule C). (If a net loss, do not enter over \$2,000) 21
- (b) Gain or loss on sale or exchange of property other than capital assets (from Schedule D) 21
- Dividends (from Schedule E) 21
- Other income (state nature of income) 21
- Total income in Items 3, and 6 to 13, inclusive 21

DEDUCTIONS

- Compensation of officers (from Schedule F) 9 600
- Salaries and wages (not deducted elsewhere) Business travel Expense 4 225 31
- Rent. (See Instruction 23) 21
- Repairs. (See Instruction 34) 21
- Bad debts (from Schedule G) 21
- Interest. (See Instruction 26) 21
- Taxes (from Schedule H). (Do not include Federal excess-profits tax) 21
- Contributions or gifts paid (from Schedule I) 21
- Losses by fire, storm, shipwreck, or other casualty, or theft. (Submit schedule, see Instruction 29) 21
- Depreciation (from Schedule J) 21
- Depletion of mines, oil and gas wells, timber, etc. (Submit schedule, see Instruction 31) 21
- Other deductions authorized by law (from Schedule K) 21
- Total deductions in Items 15 to 26, inclusive 21
- Net income for excess-profits tax computation (Item 14 minus item 27) 21
- Less: Federal excess-profits tax. (See Instruction 33) 21
- Net income (item 28 minus item 29) 21
- Less: Interest on obligations of the United States (item 8, above) 21
- Adjusted net income (item 30 minus item 31) 21

EXCESS-PROFITS TAX COMPUTATION. (See Instruction 34)

- Net income for excess-profits tax computation (item 28, above) 21
- Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1939 or for year ended June 30, 1940, if your income tax base year began in 1939 and ended on or after July 31, 1940) 21
- 10 percent of item 34 21
- Dividends received credit (85 percent of col. 2, Schedule L), but not in excess of 85 percent of item 32, above 21
- Balance subject to excess-profits tax (item 23 minus 6) (Item 35 and 36) 21
- Amount taxable at 6 percent (8 percent of item 34, but not more than item 37) and tax 21
- Balance taxable at 12 percent (item 37 minus item 38, col. 1), and tax 21
- Total excess-profits tax (total of item 38, col. 3, and item 39, col. 3) 21

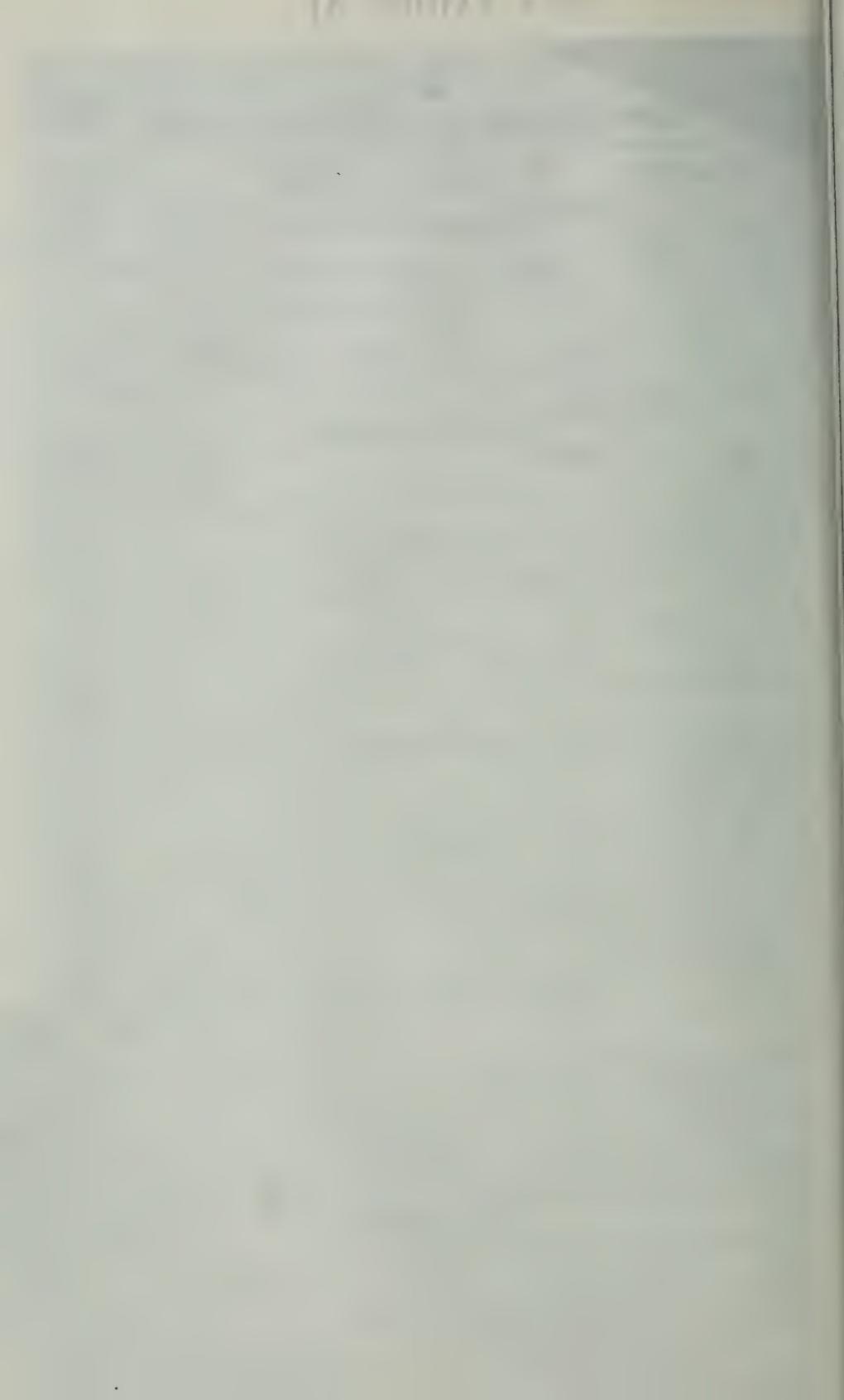
INCOME TAX COMPUTATION

- CORPORATIONS WITH NET INCOME OF NOT MORE THAN \$35,000. (See Instruction 35)
- Adjusted net income (item 32, above) 21
 - Dividends received credit (85 percent of col. 2, Schedule L), but not in excess of 85 percent of item 41, above 21
 - Balance subject to income tax (item 41 minus item 42) 21
 - Portion of item 43 (not in excess of \$5,000) 12
 - Portion of item 43 (in excess of \$5,000) and not in excess of \$30,000, and tax at 14% 14
 - Portion of item 43 (in excess of \$30,000) and tax at 16 percent 16
 - Total income tax (total tax in col. 3 of items 44, 45, and 46) 21
 - Less: Credit for foreign taxes (total of foreign taxes less foreign tax credits) 21
 - Balance of income tax (item 47 minus item 48) 21
 - Excess-profits tax (item 49, minus item 48) 21
 - Total tax due (item 49, minus item 48) 21

NOTE.—One form marked "DUPLICATE COPY" must be filed with this original return (\$10 will be assessed if duplicate copy is not filed).

EXHIBIT
NO. 1
IN ENCL. E
U. S. DIST. OF CANTON
DIRECT COURT, SOUL DIST. OF CANTON
DRAFT COPY

NO. 21-1004
NOV 21 1944
U. S. DIST. OF CANTON
DIRECT COURT, SOUL DIST. OF CANTON
DRAFT COPY



COMPEL

ON OF OFFICERS. (See Instruction 22)

1. Official Title	2. Time Devoted to Business	Percentage of Total Work Done by Officer or Employee
President Hooper C. Dunbar Secretary-Treasurer	Part-time	100%

Total Compensation of Officers. (Enter as item 15, page 1.)

Note.—Schedule H-1 (IN DUPLICATE) is required to be filed with this return if compensation in excess of \$75,000 was paid to any officer or employee.

Schedule G.—BAD DEBTS. (See Instruction 25) (See note 1)

1. Taxable Year	2. Net Income Report	3. Deductions & Allowances	4. Total Loss Before Deduction	5. Deductions & Allowances Not Deductible Under Section 25	6. Gross Amounts Not Deductible	7. Deductions & Allowances Against Loss
1935.....	\$.....	\$.....	\$.....	\$.....	\$.....	\$.....
1936.....	\$.....	\$.....	\$.....	\$.....	\$.....	\$.....
1937.....	\$.....	\$.....	\$.....	\$.....	\$.....	\$.....
1938 (See note 3).....	\$.....	\$.....	\$.....	\$.....	\$.....	\$.....
1939 (See note 3).....	\$.....	\$.....	\$.....	\$.....	\$.....	\$.....

1. Check whether deduction claimed represents worthless debts charged off as an addition to a reserve.
 2. In addition to the data required above, corporations claiming deduction other than a reserve basis must submit the information specified in Instruction 23.
 3. Not including securities which are capital assets ascertained to be worthless and charged off within the taxable year. Such securities charged off within the year covered by this return should be reported in Schedule C.

Schedule H.—TAXES. (See Instruction 27)

Nature	Amount	Name and Address of Corporation	Amount
Interest on Capital Stock	\$ 961.00		
Interest on Preferred Stock	\$ 1,500.00		
Interest on Bonds	\$ 1,500.00		
Interest on Mortgages	\$ 1,500.00		
Interest on Other Liabilities	\$ 1,500.00		
Total. (Enter as Item 21, page 1.)	\$ 5,922.00		

Schedule I.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction 28)

Nature	Amount	Name and Address of Corporation	Amount
Interest on Capital Stock	\$ 961.00		
Interest on Preferred Stock	\$ 1,500.00		
Interest on Bonds	\$ 1,500.00		
Interest on Mortgages	\$ 1,500.00		
Interest on Other Liabilities	\$ 1,500.00		
Total. (Enter as Item 21, page 1.)	\$ 5,922.00		

Schedule J.—DEPRECIATION. (See Instruction 30)

1. Kind of Property (All buildings, leasehold and fixtures, equipment, vehicles, etc.)	2. Date Acquired	3. Cost or Other Basis	4. Assets First Deemed to be Salvageable	5. Depreciation Allowed in Current Year	6. Remaining Cost of Assets to be Recovered	7. Total Basis of Assets Still Eligible for Depreciation	8. Depreciating All Assets Since This Year
See above		\$.....	\$.....	\$.....	\$.....	\$.....	\$.....

Total. (Enter as Item 24, page 1.)

Schedule K.—OTHER DEDUCTIONS. (See Instruction 32)

Expense—Attorneys and Engineers	1.912.47
" Legal Expenses Investigated	1.262.32
" Building Lease in Texas	4.000.00
" Lodging	5.494.41
Total. (Enter as Item 24, page 1.)	6.631.41

Schedule L.—DISTRIBUTIONS TO STOCKHOLDERS

Distributions Out of Earnings or Profits of the Taxable Year or Out of Earnings or Profits Accumulated Since February 28, 1932, Taxable Year Ended	1. Taxable Distribution	2. Non taxable Distribution
1. Cash	\$.....	\$.....
2. Assets other than cash or the corporation's own securities (See notes 1 and 5) (Indicate nature of assets)	\$.....	\$.....
3. Treasury stock (See notes 1 and 5)	\$.....	\$.....
4. Obligations of the corporation (bonds, notes, script, etc.) (See notes 3 and 5)	\$.....	\$.....
5. Common stock of the corporation distributed to holders of common stock (See notes 2 and 5)	\$.....	\$.....
6. Preferred stock of the corporation distributed to holders of common stock (See notes 2, 4, and 5)	\$.....	\$.....
7. Common stock of the corporation distributed to holders of preferred stock (See notes 2, 4, and 5)	\$.....	\$.....
8. Preferred stock of the corporation distributed to holders of preferred stock (See notes 2, 4, and 5)	\$.....	\$.....
9. Optional Medium of payment elected by stockholders	\$.....	\$.....
(a) Cash	\$.....	\$.....
(b) Common stock (See notes 2 and 5)	\$.....	\$.....
(c) Other (See note 5) (Specify nature)	\$.....	\$.....
10. Totals of lines 1 to 9	\$.....	\$.....

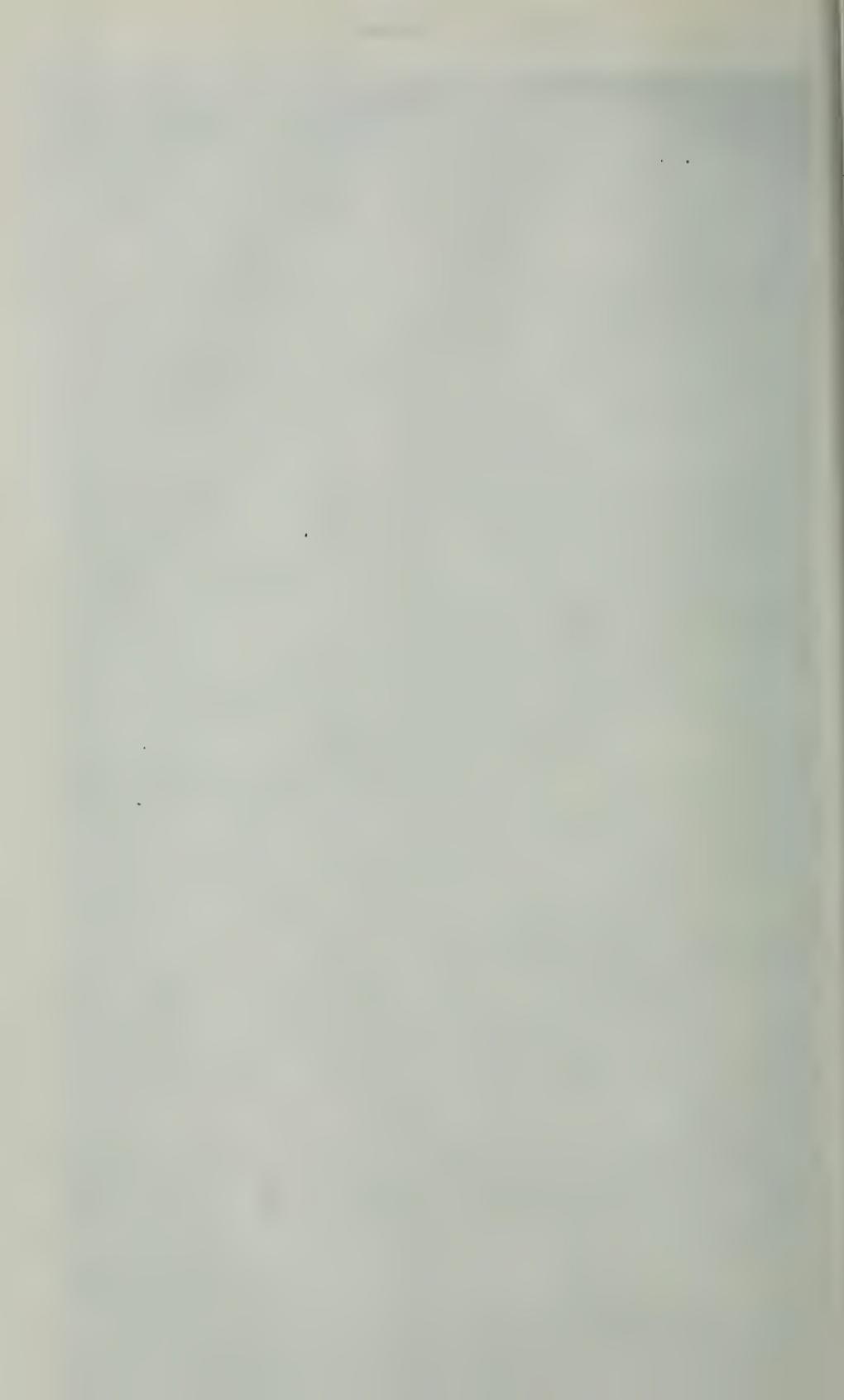
1. Enter the lesser of the two following amounts determined as of time of distribution: (a) The adjusted basis in the hands of the corporation as provided in section 113 of the Internal Revenue Code, as amended by section 214 of the Revenue Act of 1939; or (b) the fair market value.

2. Enter the amount of the fair market value at time of distribution.

3. Enter the lesser of the two following amounts determined as of the time of distribution: (a) Face value; or (b) fair market value.

4. Preferred stock for this purpose should be considered as being which is preferred as to either dividends or assets, irrespective of form.

5. Distributions in the form of rights to purchase assets or otherwise to stock or other obligations of the corporation should be entered as if the rights were distributed.



Schedule B

EXHIBIT B (See Instruction 14)

ASSETS

1. Cash
2. Notes and accounts receivable
 - Less reserve for bad debts
3. Inventories
 - (a) Raw materials
 - (b) Work in process
 - (c) Finished goods
 - (d) Supplies
4. Investments (Government obligations)
 - (a) Obligations of a State, Territory, or political subdivision thereof, or of the District of Columbia, or United States possessions
 - (b) Obligations of the United States
 - (c) Obligations of instrumentalities of the United States
5. Other investments (itemize)

6. Capital assets

- (a) Depreciable assets (itemize)
 - Oil fields*
 - Other Assets*
- Total depreciable assets
- Less reserve for depreciation
- (b) Depletable assets
- Less reserve for depletion
- (c) Land

7. Other assets (itemize)

Current Valuing Cost

8. Total Assets

LIABILITIES

9. Accounts payable

10. Bonds, notes, and mortgages payable
 - (a) With original maturity of less than 1 year
 - (b) With original maturity of 1 year or more

11. Accrued expenses (itemize)

12. Other liabilities (itemize)

13. Surplus reserves (itemize)

14. Capital stock

- (a) Preferred stock
- (b) Common stock

15. Paid-in or capital surplus

16. Earned surplus and undivided profits

17. Total Liabilities

1. Business classification (See Instruction 16)

Ind. classification

If engaged in more than one of the business classifications, check the classification which is the largest in amount and enter the percentage accounted for by each of the two business. If engaged in retail trade, also indicate the number of stores at the end of the taxable year.

2. Date of incorporation *1/22/22*3. State or country *California*

State collector's office where your return for the preceding year was filed *6th District of California*

5. The corporation's books are in care of *C. L. Foster*

Located at *Managed Body, Inc., Los Angeles*

6. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? *No*. If so, an additional return on Form 1120-P will be filed.

7. Is this a consolidated return of several corporations? *No*. If so, file a copy from the collector of internal revenue for your district Form 831, Affiliations Schedule, which shall be filled in, sworn to and filed as a part of this return.

8. If this is not a consolidated return of railroad corporations, did you own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign?

No, or (do you corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock?) *No*. If either answer is "Yes," attach appropriate schedule showing (a) Name and address of corporation or stock owned, date stock was acquired, and (b) the name and address of the corporation, partnership, trust, or association to which the corporation, trust, or association for the last taxable year was first attached.

9. Was the income of this corporation included in a consolidated return for any prior year? *No*. If so, give name and address of corporation which filed the consolidated return and the year it was filed.

QUESTIONS

AFFIDAVIT (See Instruction 21)

We, the undersigned, president or vice president, or other person, whose name is signed below, do solemnly swear or affirm that the information contained in this return is true and correct to the best of our knowledge and belief; that the accompanying schedules and statements have been examined by him and is to the best of his knowledge and belief, correct; and that he has made no false statement, for the taxable year stated, except to the Internal Revenue Service.

Subscribed and sworn to before me this

NOTARIAL SEAL

Notary Public - State of California

I, the undersigned, do solemnly swear or affirm that I have prepared this return for the person named herein that the information contained in this return is true and correct to the best of my knowledge and belief; that the accompanying schedules and statements are a true, correct, and complete statement of the information respecting the taxable year covered by this return, and that the same is in accordance with the laws of the United States.

Subscribed and sworn to before me this

NOTARIAL SEAL

Notary Public - State of California

AFFIDAVIT (See Instruction 21)

NOTARIAL SEAL

Notary Public - State of California



[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on November 21, 1944, and was tried before the above-entitled Court without a jury (a jury having been waived by stipulation of the parties), Arthur McGregor and Charles J. Higson, Esqs., appearing for the plaintiffs, and Eugene Harpole, Esq., Special Attorney, Bureau of Internal Revenue, appearing for the defendant; and after considering the evidence, both oral and documentary, and arguments of counsel which were submitted to the Court for decision, the Court, having determined that the plaintiff is entitled to judgment and ordered that findings and judgment be entered accordingly, now makes the following:

Findings of Fact

I.

Plaintiffs, Hooper C. Dunbar, Gordon B. Morris and Craig C. Horton, are the trustees of Bell View Oil Syndicate, a trust organized under a written declaration of trust, dated January 20, 1922, as amended by written declaration, [78] dated September 10, 1925. All of said trustees are citizens of the United States and residents of and domiciled in the County of Los Angeles, State of California, within the Sixth Internal Revenue Collection District of the State of California.

II.

Within the time required by law, plaintiffs filed under the name of Bell View Oil Syndicate returns (Treasury Form 940) under Title IX of the Social Security Act

for the years 1936, 1937, 1938 and 1939, and paid the tax as shown thereon. These returns did not include the amounts received as compensation by the trustees. The Commissioner of Internal Revenue thereupon ruled that said trustees were employees whose remunerations were subject to the tax imposed by Title IX of the Social Security Act, and asserted deficiencies in taxes for these years. Plaintiffs thereupon filed amended returns for each of the years 1936, 1937, 1938 and 1939 including the remunerations of the trustees and paid additional taxes to the Collector of Internal Revenue in the amount of \$179.55, of which sum the amount of \$150.75 was paid on November 9, 1940 and the amount of \$28.80 was paid on November 19, 1940. Plaintiffs paid interest and penalties thereon in the amount of \$24.86, of which sum the amount of \$23.52 was paid on December 16, 1940 and the amount of \$1.34 was paid on February 11, 1941.

III.

On September 22, 1942, plaintiffs filed with the aforesaid Collector of Internal Revenue claims for the refunding of the aforesaid taxes of \$179.55, together with interest and penalties of \$24.86 on the ground that the said trustees were not employees and therefore their remunerations were not subject to the tax imposed by Title IX of said Act. These claims were rejected by the Commissioner of Internal Revenue in a letter dated July 12, 1943, whereupon plaintiffs instituted this suit, to recover the alleged overpayment of taxes, interest and penalties, on October 27, 1943.

IV.

On January 20, 1922, pursuant to the declaration of trust under which the trust designated "Bell View Oil Syndicate" was created, one H. W. [79] McFarlane transferred Lot No. 5, Block 82, in Santa Fe Springs, California, to five named trustees. Plaintiffs during the years 1936, 1937, 1938 and 1939 and at the present time were and are the trustees acting under said declaration. The declaration of trust directs the trustees to drill a well upon the aforesaid lot in search of oil. Beneficial interests in the trust are divided into fifty thousand units of a par value of \$10.00 each. The trustees execute the powers and perform the duties conferred upon and required of them by said declaration.

V.

The important terms of the declaration of trust are as follows: The instrument gives the trustees exclusive management and control of the trust estate with power to make contracts and conveyances relating to the trust estate, to compromise claims, to hold legal title to the trust estate, to employ counsel and to develop and operate oil properties. The remaining trustees are given power to fill any vacancies occasioned by the death or resignation or refusal to act of any trustee. The trustees have the right to elect from among their number a president and vice-president, and a treasurer and secretary, as may be expedient and necessary for the conduct of their business. They may employ and remove such officers, agents and employees as they deem necessary. No personal lia-

bility is to attach to the trustees or beneficial unitholders individually. The trustees are given power to fix their own remuneration, provided that such remuneration and other office and overhead expenses are not to exceed ten per cent of the gross income of the trust. The trustees shall hold office during the lifetime of this trust. No provision is made for removal of any trustee. They are subject to no control in the management of the trust from the unitholders. The trustees are to call annual meetings of the holders of beneficial interests presenting at that time a report of receipts and disbursements made during the year. The trustees may, with the consent of the holders of two-thirds of the outstanding units of the trust estate, alter or amend the trust agreement or terminate the trust. The trustees have no power to bind unit-holders personally.

The trustees, acting as such, make all conveyances and contracts in their individual names as trustees for said trust estate. They acted at all [80] times as principals and as owners of the trust estate. They were not subject to direction or control by any other person or persons and in performing their duties under the trust instrument they did not act as the agents or employees for any person or persons. The trustees did elect officers, but never assigned any duties to such officers, and no salary or remuneration was ever paid to any officer as such.

VI.

The Commissioner of Internal Revenue overstated plaintiffs' tax liability by reason of his inclusion of the

remuneration of plaintiff-trustees as employees under Title IX of the Social Security Act, as a result of which plaintiffs overpaid said taxes in the amount of \$179.55, together with interest and penalties in the amount of \$24.86, all of which is refundable to plaintiffs, together with interest thereon as provided by law from the dates of payment thereof. [81]

Conclusions of Law

The foregoing facts considered, the Court concludes as a matter of law as follows:

I.

That plaintiffs, Hooper C. Dunbar, Gordon B. Morris, and Craig C. Horton, are the duly appointed trustees of Bell View Oil Syndicate, a trust, and are the proper parties, plaintiff.

II.

That this Court has jurisdiction to hear and determine this proceeding.

III.

That said trustees under the declaration of trust were not employees nor individuals in the employ of another within the meaning of Title IX of the Social Security Act. That they were rather principals and employers. That the remunerations of said trustees are therefore not subject to tax within the purview of said Title IX (42 U. S. C. A. Section 1101) of the Social Security Act.

IV.

That said trustees were not officers of a corporation, nor were they substantially similar to officers of a cor-

poration as that term is used in said Act (Title 26 U. S. C. A. Section 1607 (i)).

V.

That the Commissioner of Internal Revenue erred in determining that said trustees on behalf of the trust were taxable under said Title IV upon the remunerations paid to said trustees.

VI.

That plaintiffs overpaid Social Security taxes in the amount of \$179.55, and are entitled to a judgment against the defendant in this sum, together with interest as provided by law on \$150.75 from November 9, 1940, and on \$28.80 from November 19, 1940; that plaintiffs also overpaid interest and penalties upon the above tax in the amount of \$24.86, together with interest as provided by law on \$23.52 from December 16, 1940 and on \$1.34 from February 11, 1941. [82]

Dated this 1st day of December, 1944.

PEIRSON M. HALL

United States District Judge

Approved as to form

CHAS. H. CARR,

United States Attorney

By EUGENE HARPOLE

Attorney for Defendant

[Endorsed] : Filed Dec. 1, 1944. [83]

United States District Court
Southern District of California

Central Division

Civil Action No. 3259-PH

HOOPER C. DUNBAR, GORDON B. MORRIS, and
CRAIG C. HORTON, Trustees of Bell View Oil Syn-
dicate, a Trust,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause having come on regularly for trial on November 21, 1944, before the Court sitting without a jury, a jury having been expressly waived by the parties, Arthur McGregor and Charles J. Higson, Esqs., appearing as attorneys for plaintiffs and Eugene Harpole, Esq., Special Attorney, Bureau of Internal Revenue, appearing for the defendant, and evidence, both oral and documentary having been introduced by the respective parties and received, and this cause having been submitted to the Court for decision, and the Court having made and filed its findings of fact and conclusions of law and ordered that judgment be entered in favor of the plaintiffs in accordance therewith;

Now, Therefore, it is the judgment of the Court that plaintiffs do have and recover from defendant the following sums, together with interest thereon from the dates

set out below to the date hereof at the rate of six per cent (6%) per annum: [84]

Amount to be Recovered	With interest at 6% per annum from	Interest to be Recovered
\$150.75	November 9, 1940	\$36.68
\$ 28.80	November 19, 1940	\$ 6.95
\$ 23.52	December 16, 1940	\$ 5.57
\$ 1.34	February 11, 1941	\$.30
\$204.41		\$49.50

amounting in the aggregate to the sum of Two Hundred and Fifty-three Dollars and Ninety-one Cents (\$253.91), which shall bear interest according to law.

Dated this 1st day of December, 1944.

PEIRSON M. HALL

United States District Judge

Approved as to form

CHAS. H. CARR,
United States Attorney,
By EUGENE HARPOLE
Attorney for Defendant

Judgment entered Dec. 1, 1944. Docketed Dec. 1, 1944. C. O. Book 29, page 355. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Dec. 1, 1944. [85]

United States District Court
Southern District of California

Central Division

Civil Action No. 3259-PH

HOOPER C. DUNBAR, GORDON B. MORRIS, and
CRAIG C. HORTON, Trustees of Bell View Oil Syn-
dicate, a Trust,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED JUDGMENT

This cause having come on regularly for trial on November 21, 1944, before the Court sitting without a jury, a jury having been expressly waived by the parties, Arthur McGregor and Charles J. Higson, Esqs., appearing as attorneys for plaintiffs and Eugene Harpole, Esq., Special Attorney, Bureau of Internal Revenue, appearing for the defendant, and evidence, both oral and documentary having been introduced by the respective parties and received, and the cause having been submitted to the Court for decision, and the Court having made and filed its findings of fact and conclusions of law and ordered that judgment be entered in favor of the plaintiffs in accordance therewith;

Now, Therefore, it is the judgment of the Court that plaintiffs do have and recover from defendant the following overpayments, together with interest thereon at the

rate of six per cent (6%) per annum, from the dates set out below to a date preceding the date of the refund check by not more than thirty (30) days: [86]

Amount to be Refunded:

Year	Date of Payment	Tax	Interest	Penalty
1936	11- 9-40	\$47.40		
	12-16-40		\$10.03	
	12-16-40		.18	\$2.87
1937	11- 9-40	61.80		
	12-16-40		.20	3.59
1938	11- 9-40	41.55		
	12-16-40		4.31	
	12-16-40		.05	2.29
1939	11-19-40	28.80		
	2-11-41		1.34	
		—————	—————	—————
		\$179.55	\$16.11	\$8.75

Dated this 18 day of December, 1944.

PEIRSON M. HALL

United States District Judge

Approved as to form:

CHAS. H. CARR,
United States Attorney,

By E. H. MITCHELL
Attorney for Defendant

Judgment entered Dec. 18, 1944. Docketed Dec. 18, 1944. C. O. Book 29, page 547. Edmund L. Smith, Clerk; by J. M. Horn, Deputy. [87]

[Title of District Court and Cause.]

STIPULATION FOR AMENDED JUDGMENT

It Is Hereby Stipulated by and between the above entitled parties, by their respective attorneys, that the judgment entered in the above entitled cause on December 1, 1944 be amended in the manner and form of the Amended Judgment, attached hereto, in order to correctly state the method of interest computation.

Dated this 18th day of December, 1944.

ARTHUR McGREGOR

Attorney for Plaintiffs

CHARLES H. CARR,

United States District Attorney,

EDWARD H. MITCHELL,

Assistant United States District Attorney

By E. H. MITCHELL

Attorneys for Defendant

[Endorsed]: Filed Dec. 18, 1944. [88]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Hooper C. Dunbar, Gordon B. Morris and Craig C. Horton, Trustees of Bell View Oil Syndicate, a Trust and Mackay, McGregor and Reynolds, their attorneys:

Notice Is Hereby Given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final Judgment entered on the 29th day of November, 1944, and as amended on the 18th day of December, 1944.

Dated: February 27th, 1945.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant U. S. Attorneys

EUGENE HARPOLE,

Special Attorney Bureau of Internal Revenue

E. H. MITCHELL

Attorneys for Defendant-Appellant

[Endorsed]: Filed & mailed copy to Mackay, McGregor and Reynolds, attys. for plf., Feb. 27, 1945. [89]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

The defendant-appellant, United States of America, designates the following points upon which it intends to rely on appeal:

1. The District Court erred in not determining that the Bell View Oil Syndicate was at all times material a corporation for federal employment tax purposes.
2. The District Court erred in determining that the trustees of the Bell View Oil Syndicate were principals.
3. The District Court erred in determining that the trustees of the Bell View Oil Syndicate were not employees thereof.

Dated this 14th day of March, 1945.

CHARLES H. CARR,
United States Attorney
E. H. MITCHELL,
Asst. United States Attorney
GEORGE M. BRYANT,
Asst. United States Attorney
EUGENE HARPOLE,
Special Attorney Bureau of Internal Revenue
By EUGENE HARPOLE
Attorneys for defendant-appellant.

Received copy of the within this 16 day of March, 1945.
Mackay, McGregor & Reynolds, attorney for plaintiffs-appellees. A. McG.

[Endorsed]: Filed Mar. 20, 1945. [90]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS
OF RECORD ON APPEAL.

To the Clerk of the District Court of the United States
for the Southern District of California, Central
Division:

The appellant, the defendant in the above entitled action,
hereby designates the following portions of the record,
proceedings and evidence to be contained in the record
on appeal in the above entitled action.

1. The Complaint.
2. The Answer.
3. Stipulation of Facts with Exhibits attached.
4. Statement of Testimony.
5. Defendant's Exhibit A, consisting of the 1939, and excess profits tax return of Bell View Oil Syndicate.
6. Findings of Fact and Conclusions of Law.
7. Judgment entered November 29, 1944.
8. Amended Judgment entered on December 18, 1944. [91]
9. Defendant's Notice of Appeal with date of filing.
10. Appellant's Statement of Points upon which defendant, appellant, intends to rely on appeal.
11. Defendant-appellant's designation of contents of record on appeal.
12. Clerk's Certificate.

Dated: this 14th day of March, 1945.

CHARLES H. CARR—E. H.

United States Attorney

E. H. MITCHELL—E. H.

Asst. United States Attorney

GEORGE M. BRYANT—E. H.

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney, Bureau of Internal Revenue

Attorneys for defendant-appellant.

Received copy of the within this 16 day of March, 1945. Mackay, McGregor and Reynolds. A. McG., attorney for plaintiffs-appellees.

[Endorsed]: Filed Mar. 20, 1945. [92]

[Title of District Court and Cause.]

APPELLEES' AMENDED DESIGNATION OF ADDITIONAL PARTS OF RECORD ON APPEAL AND STIPULATION AS TO CONTENTS OF A PORTION OF THE RECORD ON APPEAL.

To the Clerk of the District Court of the United States for the Southern District of California, Central Division:

The appellees, the plaintiffs in the above entitled action, hereby designate additional parts of the record, proceedings and evidence to be contained in the record on appeal in the above entitled action.

1. Plaintiffs' Exhibit 1, consisting of letter from Treasury Department, dated July 12, 1943, addressed to Bell View Oil Syndicate and signed by Guy T. Helvering, Commissioner, by George Schoeneman, Deputy Commissioner.
2. Plaintiffs' Exhibit 4, consisting of cancelled check No. 16442 for \$1,500.00, payable to C. C. Horton of the Bell View Oil Syndicate and drawn on Citizens National Trust and Savings Bank, Los Angeles, California.
3. Part of plaintiffs' Exhibit 5, consisting of certified copy of "Amended" Annual Return, Treasury Form 940, of Excise Tax on Employers of Eight or More Individuals Under Title IX of the Social Security Act with rider [93] attached for the year 1936 only. The pages of said certified copy are numbered B-1, B-2, B-3 and B-4.
4. This amended designation and stipulation.
5. All orders extending time to docket cause on appeal.

It is hereby stipulated and agreed by and between counsel for the plaintiffs-appellees and the defendant-appellant that amended annual returns on Treasury Form 940 of excise tax on employers of eight or more individuals under Title IX of the Social Security Act were filed by plaintiffs for the years 1937, 1938 and 1939, that a rider was attached to each return identical to that attached to the return filed for 1936 by plaintiffs and that the returns were similar in form and material to said return for 1936, which is designated herein as part of plaintiff's

Exhibit 5, consisting of certified copy of "Amended" Annual Return Treasury Form 940.

Dated this 23rd day of April, 1945.

MACKAY, McGREGOR and
REYNOLDS

Attorneys for Plaintiffs-Appellees

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant U. S. Attorneys

EUGENE HARPOLE,

Special Attorney Bureau of Internal Revenue

By EUGENE HARPOLE

Attorneys for Defendant-Appellant

[Endorsed]: Filed Apr. 23, 1945. [94]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE
ON APPEAL.

Good cause appearing therefor, It Is Hereby Ordered that the time within which to file the record and docket the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby, is extended to and including the 28th day of May, 1945.

Dated: this 5 day of April, 1945.

PEIRSON M. HALL

United States District Judge

[Endorsed]: Filed Apr. 5, 1945. [95]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 95 inclusive contain full, true and correct copies of Complaint for Recovery of Taxes Paid; Answer; Stipulation; Statement of Testimony; Plaintiff's Exhibits 1, 4 and a portion of No. 5; Defendant's Exhibit A; Findings of Fact and Conclusions of Law; Judgment; Amended Judgment; Notice of Appeal; Statement of Points Upon Which Appellant Intends to Rely on Appeal; Appellant's Designation of Contents of Record on Appeal; Appellees' Amended Designation of Additional Parts of Record on Appeal and Stipulation as to Contents of a Portion of the Record on Appeal and Order Extending Time to Docket Cause on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 27 day of April, 1945.

EDMUND L. SMITH.

(Seal)

Clerk

By Theodore Hocke,

Chief Deputy Clerk.

[Endorsed]: No. 11049. United States Circuit Court of Appeals for the Ninth Circuit. United States of Amer-

ica, Appellant, vs. Hooper C. Dunbar, Gordon B. Morris and Craig C. Horton, Trustees of Bell View Oil Syndicate, a trust, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed April 30, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11049

UNITED STATES OF AMERICA,

Appellant,

-v-

HOOPER C. DUNBAR, GORDON B. MORRIS, and
CRAIG C. HORTON, Trustees of Bell View Oil Syndicate, a Trust,

Appellees.

STATEMENT OF POINTS RELIED UPON ON
APPEAL

The appellant states that it intends to rely in its appeal from the Judgment of the United States District Court dated November 29, 1944, and the Amended Judgment dated December 18, 1944, upon the points mentioned in

the statement of points relied upon by appellant, found at page 90 of the record of said appeal.

Dated: this 26th day of April, 1945.

CHARLES H. CARR—E. H.
United States Attorney

E. H. MITCHELL—E. H.
Asst. United States Attorney

GEORGE M. BRYANT—E. H.
Asst. United States Attorney

EUGENE HARPOLE

Special Attorney Bureau of Internal Revenue.

Attorneys for Appellant.

Receipt of copy of the above is hereby acknowledged.
April 27, 1945. Mackay, McGregor and Reynolds, by
Dorothy Erben, attorneys for appellees.

[Endorsed]: Filed Apr. 30, 1945. Paul P. O'Brien,
Clerk.

No. 11049.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOOPER C. DUNBAR, GORDON B. MORRIS and CRAIG C.
HORTON, Trustees of Bell View Oil Syndicate, a trust,
Appellees.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR THE UNITED STATES.

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HORTON, Trustees of Bell View Oil Syndicate, a trust,
Appellees.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The District Court rendered no opinion. The findings of fact and conclusions of law [R. 67-72] are not reported.

Jurisdiction.

This appeal involves federal unemployment taxes for the years 1936 to 1939, inclusive. The taxes in dispute were paid as follows: \$150.75 on November 9, 1940; \$28.80 on November 19, 1940; \$23.52 on December 16, 1940; and \$1.34 on February 11, 1941. [R. 31, 32, 33, 34, 35.] Claims for refund were filed on September 22, 1942, and were rejected by notice dated July 12, 1943. [R. 31, 32, 33, 34, 35, 56-59.] Within the time provided in Section 3772 of the Internal Revenue Code and on October 27, 1943, the taxpayer brought an action in the District Court

for recovery of the taxes paid. [R. 2-24.] Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code. The original judgment was entered on December 1, 1944 [R. 73-74], and the amended judgment was entered on December 18, 1944. [R. 75-76.] Within three months and on February 27, 1945, notice of appeal was filed [R. 78], pursuant to the provisions of Section 128(a) of the Judicial Code, as amended.

Question Presented.

Whether a business trust is subject to the excise tax imposed by Section 901 of the Social Security Act and Section 1600 of the Internal Revenue Code with respect to compensation paid to trustees who perform the duties required of them as trustees under the declaration of trust.

Statutes and Regulations Involved.

These will be found in the Appendix, *infra*, pp. 1 to 3.

Statement.

The appellees, Hooper C. Dunbar, Gordon B. Morris and Craig C. Horton were and now are the trustees of Bell View Oil Syndicate, a trust organized and existing under a written declaration of trust dated January 20, 1922, as amended by written declaration dated September 10, 1925. [R. 30, 35.]

The trust instrument was executed by H. W. McFarlane as grantor and Craig C. Horton, W. A. Roberts, Phil Grohs, H. W. McFarlane, and Hooper C. Dunbar as trustees. By its terms, the trustees agreed to hold in trust a tract of real estate previously conveyed to them by the grantor. The property was described as Lot 5, Block 82, in Santa Fe Springs, California. [R. 36-37.]

The trustees were directed to drill and develop oil wells on the property. [R. 38-39.] They were granted powers to make contracts and conveyances relating to the trust estate, to develop, operate, sell and deal in petroleum, oil properties and wells, to buy, acquire, construct, maintain and operate pipe lines, and to deal in machinery, tools and equipment of all kinds capable of being used in connection with oil, gas, or other utilties. They were given exclusive control of the trust estate and were empowered to collect moneys due the estate, to conduct litigation and to arbitrate or to compromise claims in favor of or against the estate. They were given the sole power to determine what constituted net income available for distribution to unit-holders. [R. 39-40.]

Neither the trustees nor the unitholders were to be personally liable for obligations of the business. [R. 40-41.]

The trustees were authorized to fill vacancies among their numbers [R. 41], to elect a president, vice-president, secretary and treasurer, and to appoint such other officers, agents, or attorneys as they deemed appropriate. [R. 46.] The duties and compensation of the officers were to be determined by the trustees. The trustees were also to fix their own remuneration, subject only to the limitation that not more than 10% of the trust income should be used to defray office expenses, officers' salaries, and overhead expenses. [R. 40, 46.]

The trustees were authorized to adopt a seal [R. 39], and to adopt by-laws not inconsistent with the provisions of the trust agreement. [R. 45.] Meetings of the trustees were to be held upon the call of the chairman or of any three of the trustees. [R. 45.] Action by the majority was to be binding on the trust. [R. 45.]

The beneficial interest in the estate was divided into 50,000 units having a par value of \$10 and evidenced by transferable certificates of ownership. [R. 42-44.] Meetings of the unitholders were to be held annually on call of the trustees [R. 46] and proxy voting at such meetings was authorized. [R. 47.]

The term of the trust was stated to be twenty years unless terminated by prior vote of the unitholders. It was expressly provided that the death of a unitholder or trustee during the continuance of the trust should not terminate the trust nor entitle the legal representatives of the deceased unitholder to an accounting. [R. 48.]

As remuneration for their services during 1936, 1937, 1938, and 1939, the trustees received the following sums from Bell View Oil Syndicate [R. 31, 32, 33, 35]:

	1936	1937	1938	1939
Craig C. Horton	\$18,000	\$12,500	\$ 5,700	\$4,200
Hooper C. Dunbar	16,200	10,700	4,950	4,200
Gordon B. Morris	13,200	7,700	3,200	1,200
<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
Totals	\$47,400	\$30,900	\$13,850	\$9,600

For the purposes of reporting the income of the trust estate for taxation under the federal revenue laws for the year 1939, Bell View Oil Syndicate filed a corporate income tax return form and paid taxes in accordance therewith as provided for in the case of corporations. [R. 64-66.] In this return, it was stated that appellees Dunbar and Horton devoted their entire time to the business while Gordon B. Morris performed part time duties. [R. 65.]

Bell View Oil Syndicate also filed original returns of tax (Form 940) under Title IX of the Social Security Act for the years 1936, 1937 and 1938, and under Chapter 9,

Subchapter C of the Internal Revenue Code for the year 1939 and paid the taxes reported thereon. These returns did not include as wages the compensation paid to the trustees. Upon examination of the returns, the Commissioner of Internal Revenue asserted deficiencies in tax based on his determination that the trustees were employees of the trust whose remuneration was subject to the tax imposed by Title IX of the Social Security Act and Chapter 9, Subchapter C of the Internal Revenue Code. Bell View Oil Syndicate thereupon filed amended returns, Form 940, for each of the years 1936, 1937, 1938 and 1939, including therein as taxable wages the remuneration paid to the trustees. Under the amended returns, Bell View Oil Syndicate paid additional taxes, penalty and interest with respect to compensation paid to the trustees for the years 1936, 1937, 1938 and 1939, in the respective sums of \$60.48, \$65.59, \$48.20 and \$30.14. [R. 30-35.]

On September 20, 1942, Bell View Oil Syndicate filed claims for refund of the additional taxes, penalty and interest paid for the years 1936 to 1939, inclusive, on the grounds that the trustees were not employees of the trust for federal unemployment tax purposes. [R. 10-24, 31-32, 33, 34, 35.] These claims were rejected by the Commissioner in a letter dated July 12, 1943. [R. 32, 33, 34, 35, 56-59.]

Statement of Points to Be Urged.

The assignment of errors, all of which are here relied upon, appear in the record at pages 79 and 85. They may be summarized by a statement that the District Court erred in holding that the trustees of the Bell View Oil Syndicate are not employees for federal unemployment tax purposes.

Summary of Argument.

Title IX of the Social Security Act, c. 531, 49 Stat. 620, and Subchapter C, Chapter 9, of the Internal Revenue Code impose an excise tax upon every employer with respect to having individuals in his employ. The Bell View Oil Syndicate is an employer within the meaning of these statutes and subject to the taxes imposed by them. The only question involved in this proceeding is whether the trustees of Bell View Oil Syndicate are employees within the meaning of the statutes.

The term "employee" is not defined in the Social Security Act or in the corresponding provisions of the Internal Revenue Code, and its meaning must therefore be determined in light of the intent and purpose of Congress as expressed in the statutes. The Social Security Act came into existence during a period of widespread unemployment and was designed to protect the welfare of those working for another from the hazards of unemployment. With such history and purpose in mind, an individual comes within the coverage of the Act if he is engaged, as a means of livelihood, in a business not his own. Under the facts of this case, the trustees of Bell View Oil Syndicate earned their living by working for another. They were subject to the evils which the Act sought to correct and were therefore employees within the meaning of the Act even though they were not subject to supervision or control by the beneficiaries of the trust.

ARGUMENT.

I.

For the Purposes of the Social Security Act, the Bell View Oil Syndicate Is a Separate Entity, and as Such Is the Employer of Individuals Rendering Services in Employment.

The tax involved in this proceeding was collected from the Bell View Oil Syndicate under authority of Section 901 of the Social Security Act, and Section 1600 of the Internal Revenue Code [*Appendix, infra*] which provide that every employer "shall pay for each calendar year an excise tax, with respect to having individuals in his employ" equal to stated percentages of wages payable with respect to such employment. The court below found that the trustees of the Bell View Oil Syndicate were principals and employers within the meaning of the statutes. [R. 71.] We believe that this holding disregards the express provisions of the Social Security Act and of the Internal Revenue Code.

Section 907 of the Social Security Act [*Appendix, infra*] provides that as used in Title IX, the term "employer" means a person having in his employ at least eight individuals for a stated number of days during the calendar year.¹ Section 1101(a) of the Act [*Appendix, infra*] defines the term "persons" to include a corporation and the same section further defines the term "corporation"

¹Section 1607 of the Internal Revenue Code is the same. The provisions of Title IX of the Social Security Act, and Subchapter C, Chapter 9, of the Internal Revenue Code are identical insofar as pertinent here. Consequently, hereinafter when discussing the Social Security Act and the unemployment provisions of the Internal Revenue Code, reference will be made only to the Act unless otherwise indicated.

to include associations. The Bell View Oil Syndicate was created under a written declaration of trust for the express purpose of acquiring, developing, operating and selling petroleum and petroleum properties, with provisions for continuity of existence, centralized management, limitation of personal liability of participants and transferrable shares of beneficial ownership, and there is little doubt that it is an association within the meaning of Section 1101(a). (*Morrissey v. Commissioner*, 296 U. S. 344; *Helvering v. Coleman-Gilbert*, 296 U. S. 369; *Commissioner v. Security-First Nat. Bank*, 148 F. (2d) 937 (C. C. A. 9th); *Porter v. Commissioner*, 130 F. (2d) 276 (C. C. A. 9th); *Kettleman Hill R. S. No. 1 v. Commissioner*, 116 F. (2d) 382 (C. C. A. 9th).) Although clothed in the garb of a trust, the Bell View Oil Syndicate is, for taxing purposes, a corporation, a separate entity existing above and beyond the individuals of whom it is comprised. It is this entity, the "association", which is the employer of the clerks, the stenographers, and the other individuals whose services to the trust are rendered in such circumstances as to constitute "employment" within the meaning of the Social Security Act.

United States v. Griswold, 124 F. (2d) 599 (C. C. A. 1st), upon which the court below relied, missed the whole point when it held that the trustees there involved were not employees of the trust beneficiaries. The Government had taxed the trust entity, not the beneficiaries.

The trustees of Bell View Oil Syndicate were not in business for themselves, but were managing the business for the benefit of the trust and ultimately those holding units of beneficial interest. True, the trustees were themselves holders of approximately 30% of the outstanding

shares [R. 54], but nevertheless it cannot be said that the business was theirs, for, as a corporation is an entity separate from its stockholders (*Commissioner v. Eldridge*, 79 F. (2d) 629 (C. C. A. 9th); *Continental Oil Co. v. Jones*, 113 F. (2d) 557 (C. C. A. 10th)), so also is an “association” separate from its members for taxing purposes.

II.

The Trustees of the Bell View Oil Syndicate Render Services in Employment Within the Meaning of the Social Security Act.

If, as we believe, the Bell View Oil Syndicate itself is the employer of the individuals performing services for it in employment, there remains for consideration only the question of whether the services of the trustees are rendered in employment. Stated otherwise, are the trustees “employees”?

The term “employee” has not been defined in the Social Security Act and its meaning must therefore be found outside the framework of the statute. At the common law, the question of whether an individual performing services for another is an employee is generally dependent upon the degree of supervision and control exercised by the person for whom the services are performed. (*Singer Manufacturing Co. v. Rahn*, 132 U. S. 518; *United States v. Aberdeen Aerie No. 24*, 148 F. (2d) 655 (C. C. A. 9th); *Hardware Mut. Casualty Co. v. Hildebrandt*, 119 F. (2d) 291 (C. C. A. 10th).) Even if this common law concept of employment has been imported into the Social Security Act and made controlling, the trustees are em-

ployees because they have no independence as individuals but are controlled by the trust estate.

It is the position of the Government, however, that the proper meaning of the term is not to be determined solely by reference to common law standards, but rather must be found by considering the purposes of the Act and the circumstances in which it is sought to be applied.

In this connection see *Lehigh Valley Coal Co. v. Yen-savage*, 218 Fed. 547, 552 (C. C. A. 2d), certiorari denied 235 U. S. 705, where the court said:

*** * * the word * * * must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. * * *

See, also: *Board v. Hearst Publications*, 322 U. S. 111, 124; *Grace v. Magruder*, 148 F. (2d) 679 (App. D. C.); *United States v. Vogue, Inc.*, 145 F. (2d) 609, 611-612 (C. C. A. 4th).

The purposes and objectives of the Social Security Act are well known. It was designed to protect the nation's economic and social life against the disruption brought about by unemployment resulting from business distress of the employer, or old age of the employed. Left to themselves, the nation's employers voluntarily had made no adequate provision for such circumstances. At the time of the enactment of the legislation, these conditions were everywhere at hand and the provisions of the Act were designed to prevent or alleviate as much as possible such conditions in the future. (H. Rep. No. 615, 74th Cong., 1st Sess., pp. 2-9 (1939-2 Cum. Bull. 600); S. Rep. No. 628, 74th

Cong., 1st Sess., pp. 2-16 (1939-2 Cum. Bull. 611); *Grace v. Magruder, supra*; cf. *Helvering v. Davis*, 301 U. S. 619, 641.)

And these purposes were but a part of a broader Congressional program, the goal of which was to improve the economic position of those whose means of livelihood were dependent upon another, both during employment and unemployment. (Cf. *Board v. Hearst Publications, supra*, p. 126; *Walling v. American Needlecrafts*, 139 F. (2d) 60 (C. C. A. 6th); *Grace v. Magruder, supra*; *United States v. Vogue, Inc., supra*.)

Thus, in dealing with the problem, Congress was not concerned with whether the employer did or did not relinquish the right to control the services of the employee. (Cf. *Carroll v. Social Security Board*, 128 F. (2d) 876 (C. C. A. 7th).) Its concern was in whether the relationship was one which would produce unemployment if terminated. In this connection, the important factor is whether the individual performing the services is engaged, as a means of livelihood, in labor which constitutes a necessary and integral part of the business affairs of another. (*Grace v. Magruder, supra*.)

It seems evident that the trustees' services constituted a necessary and integral part of the business of Bell View Oil Syndicate and that those services represented the primary occupation of at least two of the trustees. Six wells have been produced on the Santa Fe Springs property. [R. 50.] The trustees operated this property, producing and marketing oil, and performing other functions incident to these operations. [R. 50.] They conducted correspondence, deposited receipts, and disbursed funds. [R. 50,

51.] They held regular meetings weekly and in addition held other meetings. [R. 50.] The discharge of these duties required the full time services of the trustees. [R. 65.] Moreover, in the discharge of their undertaking, the trustees were subject to the hazards of unemployment. Despite the absence in the trust instrument of specific provision for removal of trustees, the parties obviously contemplated that trustees should be subject to removal. [R. 41.] Similarly, the trustees were potentially subject to unemployment by early termination of the trust [R. 48], by insolvency of the estate, or through personal incapacity to work.

In short, the relationship between Bell View Oil Syndicate and its trustees was one in which the trustees were engaged for hire, subject to the risks of unemployment, in building up and enhancing the business of another. In such a relationship are present all of the elements necessary to bring it within the scope of the Social Security Act.

In *Carroll v. Social Security Board*, 128 F. (2d) 876 (C. C. A. 7th), the issue was whether the liquidating receiver of a state bank was an employee of the bank and entitled to social security benefits. The receiver was appointed by the state auditor, was paid from the bank's assets, and while subject to replacement on petition of two-thirds of the creditors, was not otherwise subject to the supervision or control of the bank or its creditors. The Circuit Court of Appeals, reversing the judgment of the District Court affirming the decision of the Appeals Coun-

cil of the Social Security Board, held the plaintiff to be an employee within the meaning of the Social Security Act, stating (pp. 878, 879, 881):

“* * * an essential characteristic of the relationship of employer and employee is that the former retains the right to control and direct the individual who performs the services, both as to the result to be accomplished by the work, and as to the details and means by which that result is accomplished. Undoubtedly, this proposition generally is sound and sustained by authorities.

The situation presented, however, is so extraordinary that we doubt that it should or can be solved by the application of rules and theories relevant to an ordinary situation. Certainly it must be conceded that plaintiff was rendering services for some one. That he was not working for himself, and that he was not an independent contractor, we assume would also be conceded * * * [and] there is little room for the contention that plaintiff's services were performed as an employee of the state.

By process of elimination, we necessarily find ourselves favorably impressed with plaintiff's contention that he was an employee of the bank, notwithstanding the apparent lack of the element so often stressed in matters of this character—that is, that the bank had no control over the plaintiff's activities. We think the absence of this element is more fanciful than real, but in any event, it is not fatal to plaintiff's theory. * * *

The purpose which Congress had in mind, and the object sought to be accomplished by the enactment before us, is aptly stated in *Helvering v. Davis*, 301 U. S. 619, 640, 672, 57 S. Ct. 904, 81 L. Ed. 1307,

107 A. L. R. 1319, *et seq.* That it should be liberally construed in favor of those seeking its benefits cannot be doubted. While the question before us is not free from doubt—in fact, it is extremely close—we are of the opinion that plaintiff was an employee of the bank within the meaning of the Act and entitled to its benefits." * * *

In the *Carroll* case, the court distinguished the case of *United States v. Griswold*, 124 F.(2d) 599 (C. C. A. 1st), in which it had been held that trustees of a Massachusetts business trust were not employees within the meaning of the Social Security Act because they were not subject to control by the beneficiaries. In any event, we think that the *Griswold* case was erroneously decided by reference to concepts which disregard the declared purpose of Congress in enacting the legislation.

Perhaps the clearest indication that Congress intended trustees of a business trust to be included within the coverage of the social security legislation may be found in the history of an attempt by Massachusetts business trusts to secure legislation overruling the official position of the Bureau of Internal Revenue that trustees of a business trust performing duties other than periodic attendance at meetings, and receiving compensation therefor, were employees for purposes of the Social Security Act.² While the Social Security Act Amendments of 1939 were under consideration by the Committee of Finance of the Senate, efforts were made to amend the Act to exclude trustees of

²This ruling is published as S.S.T. 136, 1937-1 Cum. Bull. 377. See, also, S.S.T. 284, 1938-1 Cum. Bull. 474; and S.S.T. 337, 1938-2 Cum. Bull. 343.

Massachusetts business trusts from the definition of "employee". Senate Hearings before the Committee of Finance on H. R. 6635, Social Security Act Amendments. 76th Cong., 1st Sess., pp. 105-114. The Committee refused to make the requested change.

While H. R. 6635 was pending before Congress, another effort was made to exclude trustees from the Act by the introduction of a separate bill, S. 2680, 76th Cong., 1st Sess., which provided that a trustee holding either alone or with no more than four other persons, the legal title to trust property, would not be an employee of the trust irrespective of whether the trust was an association taxable as a corporation. This bill was referred to the Senate Finance Committee (84 Cong. Record, Part 7, p. 7681) which requested the views of the Treasury Department on the proposed legislation. The comments of the Treasury recommending against enactment of the bill are printed in the Congressional Record of July 13, 1939 (84 Cong. Record, Part 8, pp. 9,030-9,031). No further action was taken on the bill. It may be presumed that by twice rejecting proposals to pass legislation overruling S. S. T. 136, 1937-1 Cum. Bull. 377, the Committee indicated its approval of the Bureau's ruling that compensated trustees performing substantial services for a business trust are employees within the meaning of the Act irrespective of the degree of control to which they are subject.³

³We do not regard the views expressed by this Court in the case of *United States v. Aberdeen Aerie No. 24*, 148 F. (2d) 655, as being inconsistent with this position in light of the admittedly professional status of the doctors involved in that case as well as the fact that their services for the Aerie represented a comparatively minor portion of their professional practice.

Conclusion.

For the reasons stated herein, it is submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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September, 1945.

APPENDIX.

Social Security Act, c. 531, 49 Stat. 620:

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE.

Section 901. On and after January 1, 1936, every employer (as defined in Section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in Section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in Section 907) during such calendar year:

* * * * *

(42 U. S. C., 1940 ed., Sec. 1101.)

Section 907. When used in this title—

(a) The term “employer” does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) The term “wages” means all remuneration for employment, * * *

(c) The term “employment” means any service, of whatever nature, performed within the United States by an employee for his employer, except—

* * * * *

(42 U. S. C., 1940 ed., Sec. 1107.)

TITLE IX—GENERAL PROVISIONS

Section 1101. (a) When used in this Act—

* * * * *

(3) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(4) The term "corporation" includes association, joint-stock companies, and insurance companies.

* * * * *

(42 U. S. C., 1940 ed., Sec. 1301.)

The foregoing provisions were re-enacted in the Internal Revenue Code and became Sections 1600, 1607(a), (b), and (c), 3797(a), (3), and (4) of that statute.

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:⁴

ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907(c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.

⁴These Regulations are also applicable to Subchapter C of Chapter 9 and other provisions of the Internal Revenue Code for the calendar year 1939.

The words "employ," "employer," and "employee," as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.

Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.



See p 6. of annex brief

ABBREVIATIONS.

The following abbreviations are used throughout the Bulletin:

A, B, C, etc.—The names of individuals.

A. R. M.—Committee on Appeals and Review memorandum.

A. R. R.—Committee on Appeals and Review recommendation.

A. T.—Alcohol Tax Unit.

B. T. A.—Board of Tax Appeals.

C. B.—Cumulative Bulletin.

Ct. D.—Court decision.

C. S. T.—Capital Stock Tax Division.

C. T.—Taxes on Employment by Carriers.

D. C.—Treasury Department circular.

Em. T.—Taxes imposed by the Social Security Act, the Carriers Taxing Act of 1937, and Subchapters A, B, and C of the Internal Revenue Code.

E. T.—Estate Tax Division.

G. C. M.—General Counsel's, Assistant General Counsel's, or Chief Counsel's memorandum.

I. R. B.—Internal Revenue Bulletin.

I. R. C.—Internal Revenue Code.

I. T.—Income Tax Unit.

M, N, X, Y, Z, etc.—The names of corporations, places, or businesses, according to context.

Mim.—Mimeographed letter.

MS. or M. T.—Miscellaneous Division.

O. or L. O.—Solicitor's law opinion.

O. D.—Office decision.

Op. A. G.—Opinion of the Attorney General.

P. T.—Processing Tax Division.

S. T.—Sales Tax Division.

Sil.—Silver Tax Division.

S. M.—Solicitor's memorandum.

Sol. Op.—Solicitor's opinion.

S. R.—Solicitor's recommendation.

S. S. T.—Taxes on employment by others than carriers.

T.—Tobacco Division.

T. B. M.—Advisory Tax Board memorandum.

T. B. R.—Advisory Tax Board recommendation.

T. C.—Tax Court of the United States.

T. D.—Treasury decision.

x and *y* are used to represent certain numbers, and when used with the word "dollars" represent sums of money.

ANNOUNCEMENT RELATING TO DECISIONS OF THE TAX COURT OF THE UNITED STATES, FORMERLY UNITED STATES BOARD OF TAX APPEALS.

In order that taxpayers and the general public may be informed whether the Commissioner has acquiesced in a decision of The Tax Court of the United States, formerly known as the United States Board of Tax Appeals, disallowing a deficiency in tax determined by the Commissioner to be due, announcement will be made in the bi-weekly Internal Revenue Bulletin at the earliest practicable date. (No announcements are made in the Bulletin with respect to memorandum opinions of The Tax Court.) Notice that the Commissioner has acquiesced or nonacquiesced in a decision of The Tax Court relates only to the issue or issues decided adversely to the Government. Decisions so acquiesced in should be relied upon by officers and employees of the Bureau of Internal Revenue as precedents in the disposition of other cases.

CUMULATIVE CONTENTS.¹

BIWEEKLY BULLETINS 1946-1 TO 1946-3.

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¹ The cumulative contents includes all rulings published since January 1, 1946. The figures in the page column refer to the pages of the Bulletin in which the ruling was published.

INCOME TAX.—PART I.

A. INTERNAL REVENUE CODE.

SECTION 22(b).—GROSS INCOME: EXCLUSIONS FROM GROSS INCOME.

SECTION 29.22(b) (13)-1: Compensation of military and naval forces.
(Also Section 3808.)

1946-3-12224
Mim. 5972

Provisions of Revenue Act of 1945 relating to members of the armed forces.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington 25, D. C., January 9, 1946,

Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Others Concerned:

1. Reference is made to sections 141, 142(a), and 142(b) of the Revenue Act of 1945, which provide additional relief for members and veterans of the armed forces. The purpose of this mimeograph is to summarize these provisions and to describe the administrative procedure to be used. As stated in previous mimeographs, the policy of the Bureau is to deal with all tax matters affecting members of the armed forces "in a cooperative and sympathetic manner." Accordingly, claims clerks, auditors, and other Internal Revenue employees concerned should be instructed to give special and prompt attention to such claims and applications as may arise under these provisions.

EXCLUSIONS OF SERVICE PAY.

2. *Commissioned officers, or commissioned warrant officers, in the military and naval forces of the United States; citizens or residents of the United States as members of the military or naval forces of any of the other United Nations.*—The Revenue Act of 1945 makes no change with respect to the exclusion of the first \$1,500 of active service pay received by taxpayers in the foregoing classifications. This exclusion has been in effect for taxable years beginning on or after January 1, 1943, and will continue until the present war is declared terminated by the President.

3. *Enlisted personnel.*—Active service pay received by members of the armed forces of the *United States* below the grade of commissioned officer or commissioned warrant officer, during taxable years beginning on or after January 1, 1941, will be excluded from gross income for the purpose of computing income tax until the present war is declared terminated by the President.

4. Armed forces personnel or veterans inquiring with respect to the additional exclusions should be informed of these benefits. If the tax

has been paid for years in which additional exclusions may be allowed, instruction and assistance should be given in the preparation of appropriate claims for refund or credit on Form 843. It follows that any unpaid assessment should be abated to the extent that it may be reduced by taking into consideration the additional exclusion. It will be necessary, however, to examine the returns and accounts on which credits, refunds, or abatements are based to determine the validity of the claim and the extent to which it may be allowed. A refund or credit of any overpayment of the tax for 1941 and 1942 (taxable years beginning after December 31, 1940, and before January 1, 1943) may be allowed if the claim is filed before January 1, 1947, even though the allowance is otherwise prevented by the statute of limitations or the operation of any other law or rule (other than compromises as provided for in section 3761 of the Code).

DEFERMENT OF PAYMENT OF TAXES.

5. The new Act provides that payment of unpaid taxes for WAR YEARS which are attributable to active SERVICE PAY and PRE-SERVICE EARNED INCOME may be made in 12 quarterly installments beginning on a prescribed FIRST INSTALLMENT DATE. This deferment is allowable upon application before the first installment date to persons who served as members of the armed forces of the United States during the present war (not to persons who served only in the forces of any other nation). In order that the amounts of tax subject to extension for payment and the installment dates on which payments are due may be readily determined, the following explanation of the terms used in the Act are given:

(a) *Tax attributable to service pay* means the total tax for a war year reduced by the tax on income other than active service pay received from the United States. However, if the service person is a commissioned officer, or commissioned warrant officer, of the regular component of the Army, Navy, Marine Corps, or Coast Guard, none of his liability may be defined as "tax attributable to service pay" unless he was being granted relief on the due date(s), from paying tax because he was on sea duty or outside the continental United States.

(b) *Tax attributable to pre-service earned income* is computed as follows: (1) Determine taxable income, as defined under Chapter 1 of the Code, for war year and compute the tax; (2) subtract earned income other than service earned income from taxable income determined in (1) and compute the tax on this balance; (3) subtract the tax computed in (2) from the tax computed in (1). The resulting liability is the "tax attributable to pre-service earned income."

(c) *War year* when used with respect to the "tax attributable to service pay" means any taxable year (calendar or fiscal) beginning after December 31, 1939, and before January 1, 1947. *War year* when used with respect to "pre-service earned income" means any taxable year (calendar or fiscal) beginning after December 31, 1939, and before January 1, 1942, if the taxable year began before the taxpayer entered upon active service and if at least a part of the tax became due and payable after he entered upon active service.

(d) *The first installment date* for taxpayers released from active service at any time before December 1, 1945, is May 15, 1946. *The first installment date* in all other cases is June 15, 1947, or the 15th day

of the sixth month which begins after the date of the taxpayer's release from active duty, whichever is the earlier. However, none of the above dates is to be effective to bring the first installment due before the 15th day of the third month following the close of the taxable year to which the tax applies; nor are any of the above dates to be effective to bring the first installment due before the postponed due date established because of sea duty, or duty outside the continental United States.

The table set forth below presents a convenient reference for determining first installment dates:

Date of release (if any).	If deferred tax is attributable to—				
	A calendar year—		A fiscal year—		
	1940, 1941 1942, 1943 1944, 1945	1946	Beginning after Jan. 31, 1940, and ending before Mar. 1, 1946.	Beginning after Mar. 31, 1945, and ending before Mar. 1, 1947.	Beginning after Mar. 31, 1946, and ending before Dec. 1, 1947.
The first installment date is—					
Before Dec. 1, 1945 -----	May 15, 1946	Mar. 15, 1947	May 15, 1946	Regular due date.	Regular due date.
During:					
December, 1945-----	June 15, 1946	Mar. 15, 1947	June 15, 1946		
January, 1946-----	July 15, 1946	Mar. 15, 1947	July 15, 1946		
February, 1946-----	Aug. 15, 1946	Mar. 15, 1947	Aug. 15, 1946		
March, 1946-----	Sept. 15, 1946	Mar. 15, 1947	Sept. 15, 1946		
April, 1946-----	Oct. 15, 1946	Mar. 15, 1947	Oct. 15, 1946		
May, 1946-----	Nov. 15, 1946	Mar. 15, 1947	Nov. 15, 1946		
June, 1946-----	Dec. 15, 1946	Mar. 15, 1947	Dec. 15, 1946		
July, 1946-----	Jan. 15, 1947	Mar. 15, 1947	Jan. 15, 1947		
August, 1946-----	Feb. 15, 1947	Mar. 15, 1947	Feb. 15, 1947		
September, 1946-----	Mar. 15, 1947	Mar. 15, 1947	Mar. 15, 1947		
October, 1946-----	Apr. 15, 1947	Apr. 15, 1947	Apr. 15, 1947		
November, 1946-----	May 15, 1947	May 15, 1947	May 15, 1947		
In service after Nov. 30, 1946.	June 15, 1947	June 15, 1947	June 15, 1947	June 15, 1947	Regular due date.

COLLECTORS' PROCEDURE ON DEFERMENTS OF TAXES FOR MILITARY AND NAVAL PERSONNEL.

6. Since the granting of an extension of time for payment will be conditioned upon an application made prior to the first installment date, an examination of the return(s) and account(s) for the year(s) involved will be necessary to determine the unpaid tax attributable to (1) service pay and (2) pre-service earned income. The application for extension may be made by the taxpayer in any convenient written form. No formal type of application form will be prescribed, although the collector may, if he desires, prepare a mimeographed form for this purpose to aid in conveniently serving the taxpayers. When the return(s) and account(s) have been examined, the taxpayer should be advised that his application has been given consideration and that he will receive, prior to the installment dates, notices of the amounts to be paid. If the return(s) and account(s) disclose any unpaid tax which may not be deferred under the provisions of the Act, the taxpayer should be advised to that effect and as to the amount

which may not be deferred. However, collectors should continue to give full recognition to the extensions provided in section 513 of the Soldiers' and Sailors' Civil Relief Act, section 3804 of the Code, and Treasury Decision 5279 (C. B. 1943, 952) as they apply to such unpaid liabilities. The policy set forth in Mimeograph 5931 should also continue to serve as the basis for collection of liabilities not subject to the new installment method of payment.

7. When an extension has been granted under the installment method of payment, the date of application and the statutory authority should be noted on the account. When the amounts of the installments have been determined, notices should be prepared. The form to be used for this purpose is to be mimeographed by collectors and should be substantially similar to Exhibit I attached to this mimeograph. A tickler file should be established for the notices so that each one can be mailed to the taxpayer approximately 10 days before the due date of the installment. If more than one year's liability for a particular taxpayer is involved, notices should be prepared for each account. If the installment dates for each of the accounts coincide, the various notices should be mailed in one envelope at the appropriate time. The date of mailing of each notice should also be noted on the account. While one-twelfth of the amount extended is to be paid on the first installment date and one-twelfth is to be paid every three months thereafter until the full amount of the tax extended is paid, the taxpayer may complete payment before the specified installment dates if he wishes. However, advance payment of installments should not be construed as advancing any of the remaining installment dates. When advance payments of installments are received, the notices to which such payments apply shall be so marked to prevent their being mailed.

8. It will be the policy to allow the installment method of payment to continue until the date of the twelfth installment is reached even though the taxpayer either completely fails to make payment of one or more installments or does not make timely payment of one or more installments. Under the installment method of payment, tax attributable to service pay and pre-service earned income will be considered for practical and administrative purposes to be 12 equal and separate amounts. Thus interest on any delinquent installment will be computed at the rate of 6 per cent per annum from the due date of the installment to the date of payment.

9. *Suspension of period of limitation.*—The running of the period of limitation for collection of taxes after assessment as set forth in section 276(c) of the Code shall be suspended for the period beginning with the date of filing an application for the installment method of payment and ending six months after the date prescribed for the payment of the last installment.

ESTIMATED TAX.

10. If a taxpayer is eligible for deferment of payment of tax with respect to any "war year," he may disregard compensation received for active service as a member of the military or naval forces of the United States in determining his gross income for the purpose of computing estimated tax for such year. This provision is also to be applied for the purpose of considering penalties for underestimation of tax. However, this provision shall not apply to any person who at the

time for making a declaration of estimated tax for any "war year," is a commissioned officer or a commissioned warrant officer of the *regular* component of the Army, Navy, Marine Corps, or Coast Guard.

INTEREST.

11. Any interest paid prior to November 8, 1945 (the date of enactment of the Revenue Act of 1945), with respect to tax for which payment could be deferred under the Act, shall be credited or refunded if the claim is filed before January 1, 1947. It follows that any such interest that has accrued will not be assessed, and that any such interest which has been assessed but not collected, will be abated. Any interest accruing or assessed on or after November 8, 1945, and before the date which would be the first installment date with respect to tax for which payment could be deferred will for administrative reasons not be assessed or collected. If such interest has been paid it will be credited or refunded if the claim is filed within the time prescribed under the general rules provided in section 322 of the Code.

12. The provisions of the Revenue Act of 1945 should not be construed as conflicting with section 3804 of the Code, section 513 of the Soldiers' and Sailors' Civil Relief Act, or Treasury Decision 5279. Instead, as explained in this mimeograph, the Revenue Act of 1945 provides for further relief and benefits to veterans and servicemen.

13. Correspondence relative to the contents of this mimeograph should refer to its number and to the symbols A&C: Col.

Wm. T. SHERWOOD,
Acting Commissioner.

EXHIBIT I.

NOTICE OF INCOME TAX INSTALLMENT DUE UNDER 12 QUARTERLY PAYMENT PLAN FOR VETERANS AND SERVICEMEN.

Taxable year.	Total tax deferred.	Unpaid balance.	Amount of this installment.	Date this installment is due.
Name, address, and account number: _____				Your remittance, together with this notice, should reach the office of collector of internal revenue, _____ (address) not later than the date shown above. Make check or money order payable to "Collector of Internal Revenue." An installment not paid on time will bear interest at the rate of 6 per cent per annum from the date due until paid.
To insure proper credit please return this notice with your remittance.				

SECTION 23(a).—DEDUCTIONS FROM GROSS INCOME: EXPENSES.

SECTION 19.23(a)-2: Traveling expenses.
(Also Section 24, Section 19.24-1.)

1946-3-12225
Ct. D. 1659

INCOME TAX—INTERNAL REVENUE CODE—DECISION OF SUPREME COURT.

1. GROSS INCOME—DEDUCTIONS—TRAVELING EXPENSES.

The taxpayer, who has resided with his family in Jackson, Miss., since 1903, became in 1906 an employee of a railroad which had its

main office in Mobile, Ala. An arrangement with the railroad permitted him to determine for himself the amount of time spent in each of the two cities. Taxpayer's principal post of business was at the main office, but during the taxable years 1939 and 1940 he spent most of his time in Jackson. He made 33 trips in 1939 and 40 trips in 1940 between the two cities, and deducted in his Federal income tax returns traveling expenses from Jackson to Mobile and living expenses while in Mobile. *Held:* The taxpayer is not entitled to a deduction for traveling and living expenses while away from home in the pursuit of a trade or business under the provisions of section 23(a)(1)(A) of the Internal Revenue Code. His expenses were incurred solely as the result of his desire to maintain a home in Jackson. Traveling expenses in pursuit of business, within the meaning of the section, could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors.

[NOTE.—The Court found it unnecessary to decide the meaning of the word "home" as used in section 23(a)(1)(A) of the Code.]

2. DECISION REVERSED.

Decision of the United States Circuit Court of Appeals, Fifth Circuit (148 Fed. (2d), 163), reversing memorandum opinion of The Tax Court, reversed.

SUPREME COURT OF THE UNITED STATES.

Commissioner of Internal Revenue, petitioner, v. J. N. Flowers.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1946.]

OPINION.

Mr. Justice MURPHY delivered the opinion of the Court.

This case presents a problem as to the meaning and application of the provision of section 23(a)(1)(A) of the Internal Revenue Code¹ allowing a deduction for income tax purposes of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

The taxpayer, a lawyer, has resided with his family in Jackson, Miss., since 1903. There he has paid taxes, voted, schooled his children and established social and religious connections. He built a house in Jackson nearly 30 years ago and at all times has maintained it for himself and his family. He has been connected with several law firms in Jackson, one of which he formed and which has borne his name since 1922.

In 1906 the taxpayer began to represent the predecessor of the Gulf, Mobile & Ohio Railroad, his present employer. He acted as trial counsel for the railroad throughout Mississippi. From 1918 until 1927 he acted as special counsel for the railroad in Mississippi. He was elected general solicitor in 1927 and continued to be elected to that position each year until 1930, when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad.

The main office of the Gulf, Mobile & Ohio Railroad is in Mobile, Ala., as was also the main office of its predecessor. When offered the position of general

¹ 26 U. S. C., section 23(a)(1)(A), as amended (56 Stat., 819).

SEC. 23. DEDUCTIONS FROM GROSS INCOME.—

in computing net income there shall be allowed as deductions:

(a) EXPENSES.—

(1) TRADE OR BUSINESS EXPENSES.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

solicitor in 1927, the taxpayer was unwilling to accept it if it required him to move from Jackson to Mobile. He had established himself in Jackson both professionally and personally and was not desirous of moving away. As a result, an arrangement was made between him and the railroad whereby he could accept the position and continue to reside in Jackson on condition that he pay his traveling expenses between Mobile and Jackson and pay his living expenses in both places. This arrangement permitted the taxpayer to determine for himself the amount of time he would spend in each of the two cities and was in effect during 1939 and 1940, the taxable years in question.

The railroad company provided an office for the taxpayer in Mobile but not in Jackson. When he worked in Jackson his law firm provided him with office space, although he no longer participated in the firm's business or shared in its profits. He used his own office furniture and fixtures at this office. The railroad, however, furnished telephone service and a typewriter and desk for his secretary. It also paid the secretary's expenses while in Jackson. Most of the legal business of the railroad was centered in or conducted from Jackson, but this business was handled by local counsel for the railroad. The taxpayer's participation was advisory only and was no different from his participation in the railroad's legal business in other areas.

The taxpayer's principal post of business was at the main office in Mobile. However, during the taxable years of 1939 and 1940, he devoted nearly all of his time to matters relating to the merger of the railroads. Since it was left to him where he would do his work, he spent most of his time in Jackson during this period. In connection with the merger, one of the companies was involved in certain litigation in the Federal court in Jackson and the taxpayer participated in that litigation.

During 1939 he spent 203 days in Jackson and 66 in Mobile, making 33 trips between the two cities. During 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips between the two cities. The railroad paid all of his traveling expenses when he went on business trips to points other than Jackson or Mobile. But it paid none of his expenses in traveling between these two points or while he was at either of them.

The taxpayer deducted \$900 in his 1939 income tax return and \$1,620 in his 1940 return as traveling expenses incurred in making trips from Jackson to Mobile and as expenditures for meals and hotel accommodations while in Mobile.² The Commissioner disallowed the deductions, which action was sustained by The Tax Court. But the Fifth Circuit Court of Appeals reversed The Tax Court's judgment (148 Fed. (2d), 163), and we granted certiorari because of a conflict between the decision below and that reached by the Fourth Circuit Court of Appeals in *Barnhill v. Commissioner* (148 Fed. (2d), 913 [Ct. D. 1646, I. R. B. 1945-19, 2]).

The portion of section 23(a)(1)(A) authorizing the deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" is one of the specific examples given by Congress in that section of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." It is to be contrasted with the provision of section 24(a)(1) of the Internal Revenue Code disallowing any deductions for "personal, living, or family expenses." And it is to be read in light of the interpretation given it by section 19.23(a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code. This interpretation, which is precisely the same as that given to identical traveling expense deductions authorized by prior and successive Revenue Acts,³ is deemed to possess implied legislative approval and to have the effect of law. (*Helvering v. Winmill*, 305 U. S., 79 [Ct. D. 1365, C. B. 1938-2, 212]; *Boehm v. Commissioner*, 326 U. S., — [Ct. D. 1652, I. R. B. 1945-23, 10]). In pertinent part, this interpretation states that "Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses. * * * Only such expenses as are reasonable

² No claim for deduction was made by the taxpayer for the amounts spent in traveling from Mobile to Jackson. He also took trips during the taxable years to Washington, New York, New Orleans, Baton Rouge, Memphis, and Jackson (Tenn.), which were apparently in the nature of business trips for which the taxpayer presumably was reimbursed by the railroad. No claim was made in regard to them.

³ Article 23(a)-2 of Regulations 101, 94, 86; article 122 of Regulations 77 and 74; article 102 of Regulations 69 and 65; article 101(a) of Regulations 62.

and necessary in the conduct of the business and directly attributable to it may be deducted. * * * Commuters' fares are not considered as business expenses and are not deductible."

Three conditions must thus be satisfied before a traveling expense deduction may be made under section 23(a)(1)(A):

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. (See *Commissioner v. Heininger*, 320 U. S., 467, 475 [Ct. D. 1596, C. B. 1944, 484].) And The Tax Court's inferences and conclusions on such a factual matter, under established principles, should not be disturbed by an appellate court. (*Commissioner v. Scottish American Co.*, 323 U. S., 119 [Ct. D. 1619, C. B. 1944, 340]; *Dobson v. Commissioner*, 320 U. S., 489 [Ct. D. 1597, C. B. 1944, 56].)

In this instance, The Tax Court without detailed elaboration concluded that "The situation presented in this proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It accordingly disallowed the deductions on the ground that they represent living and personal expenses rather than traveling expenses incurred while away from home in the pursuit of business. The court below accepted The Tax Court's findings of fact but reversed its judgment on the basis that it had improperly construed the word "home" as used in the second condition precedent to a traveling-expense deduction under section 23(a)(1)(A). The Tax Court, it was said, erroneously construed the word to mean the post, station or place of business where the taxpayer was employed—in this instance, Mobile—and thus erred in concluding that the expenditures in issue were not incurred "while away from home." The court below felt that the word was to be given no such "unusual" or "extraordinary" meaning in this statute, that it simply meant "that place where one in fact resides" or "the principal place of abode of one who has the intention to live there permanently." (148 Fed. (2d), at 164.) Since the taxpayer here admittedly had his home, as thus defined, in Jackson and since the expenses were incurred while he was away from Jackson, the deduction was permissible.

The meaning of the word "home" in section 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. (4 Mertens, Law of Federal Income Taxation (1942), section 25.82.) The Tax Court⁴ and the administrative rulings⁵ have consistently defined it as the equivalent of the taxpayer's place of business. (See *Barnhill v. Commissioner*, supra (C. C. A. 4).) On the other hand, the decision below and *Wallace v. Commissioner* (144 Fed. (2d), 407 (C. C. A. 9)), have flatly rejected that view and have confined the term to the taxpayer's actual residence. (See also *Coburn v. Commissioner*, 138 Fed. (2d), 763 (C. C. A. 2).)

We deem it unnecessary here to enter into or to decide this conflict. The Tax Court's opinion, as we read it, was grounded neither solely nor primarily upon that agency's conception of the word "home." Its discussion was directed mainly toward the relation of the expenditures to the railroad's business, a relationship required by the third condition of the deduction. Thus even if The Tax Court's definition of the word "home" was implicit in its decision and even if that

⁴ *Bixler v. Commissioner* (5 B. T. A., 1181); *Griesemer v. Commissioner* (10 B. T. A., 386); *Brown v. Commissioner* (13 B. T. A., 832); *Duncan v. Commissioner* (17 B. T. A., 1088); *Peters v. Commissioner* (19 B. T. A., 901); *Lindsay v. Commissioner* (34 B. T. A., 840); *Powell v. Commissioner* (34 B. T. A., 655); *Tracy v. Commissioner* (39 B. T. A., 578); *Priddy v. Commissioner* (43 B. T. A., 18); *Schurer v. Commissioner* (3 T. C., 544); *Gustafson v. Commissioner* (3 T. C., 998).

⁵ Section 19.23(a)-2 of Treasury Regulations 103 does not attempt to define the word "home" although the Commissioner argues that the statement therein contained to the effect that commuters' fares are not business expenses and are not deductible "necessarily rests on the premise that 'home' for tax purposes is at the locality of the taxpayer's business headquarters." Other administrative rulings have been more explicit in treating the statutory home as the abode at the taxpayer's regular post of duty. (See, e. g., O. D. 1021, C. B. 5, 174 (1919); I. T. 1264, C. B. I-1, 122 (1922); I. T. 3314, C. B. 1939-2, 152; G. C. M. 23672, C. B. 1943, 66.)

definition was erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the railroad's business was lacking. Failure to satisfy any one of the three conditions destroys the traveling expense deduction.

Turning our attention to the third condition, this case is disposed of quickly. There is no claim that The Tax Court misconstrued this condition or used improper standards in applying it. And it is readily apparent from the facts that its inferences were supported by evidence and that its conclusion that the expenditures in issue were nondeductible living and personal expenses was fully justified.

The facts demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad. Jackson was his regular home. Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be nondeductible living and personal expenses lacking the necessary direct relation to the prosecution of the business. The character of such expenses is unaltered by the circumstance that the taxpayer's post of duty was in Mobile, thereby increasing the costs of transportation, food and lodging. Whether he maintained one abode or two, whether he traveled 3 blocks or 300 miles to work, the nature of these expenditures remained the same.

The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were his personal and living costs in Jackson. They were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the railroad's legal business. The railroad did not require him to travel on business from Jackson to Mobile or to maintain living quarters in both cities. Nor did it compel him, save in one instance, to perform tasks for it in Jackson. It simply asked him to be at his principal post in Mobile as business demanded and as his personal convenience was served, allowing him to divide his business time between Mobile and Jackson as he saw fit. Except for the Federal court litigation, all of the taxpayer's work in Jackson would normally have been performed in the headquarters at Mobile. The fact that he traveled frequently between the two cities and incurred extra living expenses in Mobile, while doing much of his work in Jackson, was occasioned solely by his personal propensities. The railroad gained nothing from this arrangement except the personal satisfaction of the taxpayer.

Travel expenses in pursuit of business within the meaning of section 23(a)(1)(A) could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here.

It follows that the court below erred in reversing the judgment of The Tax Court.

**Mr. Justice JACKSON took no part in the consideration or decision of this case.
Dissenting opinion by Mr. Justice RUTLEDGE**

SECTION 23(b).—DEDUCTIONS FROM GROSS INCOME: INTEREST.

SECTION 19.23(b)-1: Interest.

INTERNAL REVENUE CODE.

Payments made by corporation to holders of corporate obligations.
(See Ct. D. 1660, page 27.)

SECTION 24.—ITEMS NOT DEDUCTIBLE.

SECTION 19.24-1: Personal and family expenses.

INTERNAL REVENUE CODE.

Traveling and living expenses not incurred in the pursuit of trade or business. (See Ct. D. 1659, page 6.)

SECTION 115.—DISTRIBUTIONS BY CORPORATIONS.

SECTION 19.115-1: Dividends.

INTERNAL REVENUE CODE.

Payments made by corporation to holders of corporate obligations. (See Ct. D. 1660, page 27.)

SECTION 141.—CONSOLIDATED RETURNS.

REGULATIONS 104, SECTION 23.11: Consolidated returns for subsequent years.
(Also Section 33.11, Regulations 110.)

1946-3-12226
I. T. 3779

INTERNAL REVENUE CODE.

Election with respect to filing separate Federal income and excess profits tax returns for fiscal years ending in 1946 by affiliated corporations which filed consolidated Federal income and excess profits tax returns for fiscal years ended in 1945.

Advice is requested whether affiliated corporations which filed consolidated Federal income and excess profits tax returns for fiscal years ended in 1945 may elect to file separate Federal income and excess profits tax returns for fiscal years ending in 1946.

Section 141(a) of the Internal Revenue Code, as amended, provides in part as follows:

(a) **PRIVILEGE TO FILE CONSOLIDATED INCOME AND EXCESS-PROFITS-TAX RETURNS.**— * * * The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return.
* * *

Section 23.11(a) of Regulations 104, as amended by Treasury Decision 5087 (C. B. 1941-2, 141), relating to consolidated income tax returns of affiliated corporations, provides in part as follows:

(a) **CONSOLIDATED RETURNS REQUIRED FOR SUBSEQUENT YEARS.**—If a consolidated return is made under these regulations for any taxable year, a consolidated return must be made for each subsequent taxable year during which the affiliated group remains in existence unless * * * (2) *Chapter 1 of the Code to the extent applicable to corporations*, or these regulations which have been con-

sented to, have been amended and any such amendment is of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated returns, * * *. [Italics supplied.]

Section 33.11(a) of Regulations 110, as amended by Treasury Decision 5087, supra, relating to consolidated excess profits tax returns of affiliated corporations, provides in part as follows:

(a) **CONSOLIDATED RETURNS REQUIRED FOR SUBSEQUENT YEARS.**—If a consolidated return is made under these regulations for any taxable year, a consolidated return must be made for each subsequent taxable year during which the affiliated group remains in existence unless * * * (2) *Chapter 1 of the Code to the extent applicable to corporations, or Subchapter E of Chapter 2 of the Code,* or these regulations which have been consented to, have been amended and any such amendment is of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated returns, * * *. [Italics supplied.]

It is held that Chapter 1 and Subchapter E of Chapter 2 of the Internal Revenue Code have been so amended by the Revenue Act of 1945 as to make less advantageous to affiliated groups as a class the continued filing of consolidated Federal income and excess profits tax returns for taxable years ending after December 31, 1945. Accordingly, affiliated corporations which filed consolidated income and excess profits tax returns for fiscal years ended in 1945 may, notwithstanding the filing of such returns, file separate income and excess profits tax returns for fiscal years ending in 1946.

**REGULATIONS 104, SECTION 23.11: Consolidated
returns for subsequent years.
(Also Section 33.11, Regulations 110.)**

1946-3-12227
I. T. 3780

INTERNAL REVENUE CODE.

Election with respect to filing separate Federal income and excess profits tax returns for the calendar year 1945 by affiliated corporations which filed consolidated Federal income and excess profits tax returns for the calendar year 1944.

Advice is requested whether affiliated corporations which filed consolidated Federal income and excess profits tax returns for the calendar year 1944 may elect to file separate Federal income and excess profits tax returns for the calendar year 1945.

Section 141(a) of the Internal Revenue Code, as amended, provides in part as follows:

(a) **PRIVILEGE TO FILE CONSOLIDATED INCOME AND EXCESS-PROFITS-TAX RETURNS.**—* * * The making of consolidated returns shall be upon the condition that the affiliated group shall make both a consolidated income-tax return and a consolidated excess-profits-tax return for the taxable year, and that all corporations which at any time during the taxable year have been members of the affiliated group making a consolidated income-tax return consent to all the consolidated income- and excess-profits-tax regulations prescribed under subsection (b) prior to the last day prescribed by law for the filing of such return.
* * *

Section 23.11(a) of Regulations 104, as amended by Treasury Decision 5087 (C. B. 1941-2, 141), relating to consolidated income tax returns of affiliated corporations, provides as follows:

(a) **CONSOLIDATED RETURNS REQUIRED FOR SUBSEQUENT YEARS.**—If a consolidated return is made under these regulations for any taxable year, a con-

solidated return must be made for each subsequent taxable year during which the affiliated group remains in existence unless (1) a corporation (other than a corporation created or organized, directly or indirectly, by a member of the group) has become a member of the group during such subsequent taxable year, or (2) Chapter 1 of the Code to the extent applicable to corporations, or these regulations which have been consented to, have been amended and any such amendment is of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated returns, or (3) the Commissioner, prior to the time of making the return, upon application made by the common parent corporation and for good cause shown, grants permission to change.

Section 33.11(a) of Regulations 110, as amended by Treasury Decision 5087, supra, relating to consolidated excess profits tax returns of affiliated corporations, provides as follows:

(a) **CONSOQIDATED RETURNS REQUIRED FOR SUBSEQUENT YEARS.**—If a consolidated return is made under these regulations for any taxable year, a consolidated return must be made for each subsequent taxable year during which the affiliated group remains in existence unless (1) a corporation (other than a corporation created or organized, directly or indirectly, by a member of the group) has become a member of the group during such subsequent taxable year, or (2) Chapter 1 of the Code to the extent applicable to corporations, or Subchapter E of Chapter 2 of the Code, or these regulations which have been consented to, have been amended and any such amendment is of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated returns, or (3) the Commissioner, prior to the time of making the return, upon application made by the common parent corporation and for good cause shown, grants permission to change.

It is held that the amendments to the Internal Revenue Code by the Tax Adjustment Act of 1945 and the Revenue Act of 1945, and the amendments to Regulations 104 and to Regulations 110 by Treasury Decision 5476 (I. R. B. 1945-18, 4) are not of a character which makes less advantageous to affiliated groups as a class the continued filing of consolidated Federal income and excess profits tax returns for the calendar year 1945. (The Revenue Act of 1945 made no changes affecting the computation of corporation income and excess profits taxes for the calendar year 1945.) Accordingly, affiliated corporations which filed consolidated income and excess profits tax returns for the calendar year 1944 will not be permitted to file separate income and excess profits tax returns for the calendar year 1945, unless one of the other conditions provided in section 33.11(a) of Regulations 104, supra, and section 33.11(a) of Regulations 110, supra, is met or unless the law or regulations with respect to the calendar year 1945 are later amended so as to make less advantageous the continued filing of consolidated returns. (Cf. I. T. 3769, I. R. B. 1945-22, 11.)

REGULATIONS 110, SECTION 33.11: Consolidated returns for subsequent years.

INTERNAL REVENUE CODE.

Election to file separate returns for fiscal years ending in 1946 where an affiliated group filed consolidated returns for fiscal years ended in 1945. (See I. T. 3779, page 11.)

REGULATIONS 110, SECTION 33.11: Consolidated returns for subsequent years.

INTERNAL REVENUE CODE.

Election to file separate returns for calendar year 1945 where an affiliated group filed consolidated returns for calendar year 1944. (See I.T. 3780, page 12.)

SECTION 143.—WITHHOLDING OF TAX AT SOURCE.

SECTION 29.143-2: Fixed or determinable annual or periodical income.

1946-3-12228
I.T. 3781

INTERNAL REVENUE CODE.

Amounts distributed pursuant to a plan of reorganization which are taxable as dividends by reason of section 112(c)(2) of the Internal Revenue Code do not constitute dividends or other fixed or determinable annual or periodical income within the meaning of section 143(b) of the Code, and such amounts are not subject to withholding of tax at the source when distributed to nonresident alien stockholders.

Advice is requested whether income tax is required to be withheld at the source under section 143(b) of the Internal Revenue Code with respect to corporate distributions which qualify as dividends under section 112(c)(2) of the Code, when such distributions are made to nonresident alien stockholders.

In the case under consideration, involving a reorganization as defined in section 112(g) of the Code, the cumulative preferred stock and the no-par common stock of the reorganized company were converted into new cumulative convertible preferred stock and new par value common stock, respectively. The dividends on the old preferred stock had not been paid for several years prior to reorganization. Pursuant to the plan of reorganization, each share of the old preferred stock was to be replaced with one share of the new preferred stock, eight shares of the new common stock, and a small cash payment. Accumulated earnings and profits of the reorganized company exceeded the cash to be paid.

The cash payments will make available to stockholders a portion of the accumulated earnings and profits of the reorganized company and thus will have the effect of a distribution of a taxable dividend. In accordance with the provisions of section 112(c)(2) of the Code, the payments are taxable as dividends. It does not follow, however, that the payments are identical with ordinary dividends (*Commissioner v. George O. Kolb*, 100 Fed. (2d), 920), or, if identical, that they are subject to withholding of tax at the source under section 143(b) of the Code. That section does not require withholding of tax at the source with respect to all corporate distributions. Under the wording of the statute and the language of section 29.143-2 of Regulations 111, only fixed or determinable annual or periodical income is subject to withholding.

It is held that amounts distributed pursuant to a plan of reorganization, which amounts are taxable as dividends by reason of section 112(c)(2) of the Internal Revenue Code, do not constitute dividends or other fixed or determinable annual or periodical income within the

meaning of section 143(b) of the Code, and such amounts are not subject to withholding of tax at the source when distributed to nonresident alien stockholders. (See generally L. O. 1024, C. B. 2, 189 (1920), and G. C. M. 21575, C. B. 1939-2, 172.)

SECTION 710.—IMPOSITION OF TAX.

REGULATIONS 112, SECTION 35.710-5: Deferment of payment of tax in case of base period or invested capital abnormality.

INTERNAL REVENUE CODE.

Regulations 112 amended. (See T. D. 5490, page 16.)

SECTION 780.—POST-WAR REFUND OF EXCESS PROFITS TAX.

REGULATIONS 112, SECTION 35.780-1: Post-war refund of excess profits tax.
(Also Section 30.780-1, Regulations 109.)

INTERNAL REVENUE CODE.

Regulations 109 and 112 amended. (See T. D. 5490, page 16.)

SECTION 781.—SPECIAL RULES FOR APPLICATION OF SECTION 780.

REGULATIONS 112, SECTION 35.781-1: Special rules for application of section 780.
(Also Section 30.781-1, Regulations 109.)

INTERNAL REVENUE CODE.

Regulations 109 and 112 amended. (See T. D. 5490, page 16.)

SECTION 783.—CREDIT FOR DEBT RETIREMENT.

REGULATIONS 112, SECTION 35.783-1: Credit for debt retirement.

INTERNAL REVENUE CODE.

Regulations 112 amended. (See T. D. 5490, page 16.)

REGULATIONS 112, SECTION 35.783-2: Election to take credit for debt retirement for taxable years beginning after September 1, 1942, and ending before February 25, 1944.

INTERNAL REVENUE CODE.

Regulations 112 amended. (See T. D. 5490, page 16.)

**REGULATIONS 112, SECTION 35.783-3: Credit for debt
retirement in case of certain successions.**

INTERNAL REVENUE CODE.

Regulations 112 amended. (See T. D. 5490, below.)

**SECTION 784.—TEN PER CENTUM CREDIT
AGAINST EXCESS PROFITS TAX.**

**REGULATIONS 112, SECTION 35.784-1: Ten per cent
credit against excess profits tax.**

1946-3-12230
T. D. 5490

(Also Section 710, Section 35.710-5, Regulations 112; Section 780, Section 35.780-1, Regulations 112, Section 30.780-1, Regulations 109; Section 781, Section 35.781-1, Regulations 112, Section 30.781-1, Regulations 109; Section 783, Sections 35.783-1, 35.783-2, and 35.783-3, Regulations 112.)

**TITLE 26—INTERNAL REVENUE.—CHAPTER I, SUBCHAPTER A, PART 35 AND
PART 30.**

Regulations 112 and 109 amended to conform to section 3 of the Tax Adjustment Act of 1945, relating to changes in provisions with respect to post-war refund of excess-profits tax.

**TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.**

To Collectors of Internal Revenue and Others Concerned:

REGULATIONS 112.

In order to conform Regulations 112 [Part 35, Title 26, Code of Federal Regulations, Cum. Sup.] to section 3 of the Tax Adjustment Act of 1945 (Public Law 172, Seventy-ninth Congress), approved July 31, 1945, such regulations are amended as follows:

PARAGRAPH 1. Section 35.710-5, as amended by Treasury Decision 5393, approved July 21, 1944 [C. B. 1944, 415], is further amended as follows:

(A) By inserting in the first sentence of the second paragraph immediately following the word "retirement": "or the 10 per cent credit under section 784."

(B) By amending the last two sentences of the third paragraph to read as follows:

In such case the tax deferment claimed under section 710(a)(5) and this section shall be denied and appropriate adjustment shall be made in the amount of tax otherwise shown by the taxpayer to be payable. For the purposes of section 271 (made applicable to Subchapter E of Chapter 2 by section 729) relating to the definition of deficiency, the amount of tax shown by the taxpayer to be payable so adjusted shall be considered the amount of tax shown on the return.

PAR. 2. There is inserted immediately preceding section 35.780-1 the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

(a) The first sentence of section 780(a) of the Internal Revenue Code is amended by striking out the words "the date of cessation of hostilities in the present war" and substituting in lieu thereof the following: "December 31, 1943".

(b) Section 780(b) of the Internal Revenue Code is amended by striking out the words "three months before the date of maturity of bonds for such year under subsection (c)" and inserting in lieu thereof the following: "July 1, 1945".

(c) Section 780(c) of the Internal Revenue Code is amended (1) by inserting in the last sentence after the words "to which this section applies" the following: "shall be payable at the option of the owner on or after January 1, 1946, and", and (2) by striking out the last two lines from the table at the end thereof.

* * * * *

PAR. 3. Section 35.780-1(a), as amended by Treasury Decision 5442, approved March 2, 1945 [I. R. B. 1945-6, 18], is further amended by striking out the second sentence and inserting in lieu thereof:

The taxable years so specified include all taxable years under these regulations which begin before January 1, 1944.

PAR. 4. There is inserted immediately preceding section 35.781-1 the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

* * * * *

(d) Section 781(a) of the Internal Revenue Code is amended by striking out the words "three months before the date of maturity of the bonds for such year" and inserting in lieu thereof the following: "July 1, 1945".

(e) The last sentence of section 781(b) of the Internal Revenue Code is amended by striking out the words "the time of the maturity of bonds issued with respect to such taxable year" and substituting in lieu thereof the following: "January 1, 1946".

(f) Section 781(c) of the Internal Revenue Code is amended to read as follows:

"(c) **TAX PAYMENTS AFTER CUT-OFF DATE.**—In the case of a payment of the tax imposed by this subchapter shown on the return for any taxable year for which a credit is provided in section 780(a), or the payment of a deficiency in respect of such tax for any such taxable year, on or after July 1, 1945, the amount of the credit under section 780(a) for such taxable year attributable to such payment shall be paid the taxpayer in cash. No interest for the period after December 31, 1945, shall be assessed or collected on that portion of the tax or deficiency so paid equal to the credit under section 780(a) attributable to such payment. If after January 1, 1946, there is any credit under section 780(a) remaining in favor of the taxpayer attributable to any taxable year for which a credit is provided in section 780(a), such remainder shall be paid to the taxpayer in cash. No amount of any payment made under this subsection to a taxpayer shall be included in gross income."

* * * * *

PAR. 5. Section 35.781-1, as amended by Treasury Decision 5442, is further amended as follows:

(A) By striking out section 35.781-1(a) and inserting in lieu thereof the following:

(a) *Deficiencies; refunds and credits of overpayments; and payments of certain post-war credits in cash.*—In case a deficiency is paid by the taxpayer, or an overpayment is refunded or credited to the taxpayer, for any taxable year to which section 780(a) applies, appropriate adjustments will be made in the post-war credit account of the taxpayer. In such case, whenever the amount of bonds should be increased or reduced, the Commissioner of Internal Revenue shall certify the status of the account to the Secretary in order that appropriate adjustments may be made in the amount of bonds. If the refund or credit of an overpayment was made on or before February 25, 1944 (the date of the enactment of the Revenue Act of 1943), the adjustment of the post-war credit or bonds of the taxpayer shall be made in accordance with section 781(b) in force prior to such date. If the refund or credit of an overpayment is made after February 25, 1944, such adjustment or, in an appropriate case, the reduction in the amount of the refund or credit of the overpayment of the tax, shall be made in accordance with section 781(b), as amended. Collection from a taxpayer under section 781(b) in force prior to February 25, 1944, of the amount by which charges (arising by reason of a refund or credit of an overpayment) exceed the amount of the post-war credit of the taxpayer shall be made by the Commissioner of Internal Revenue.

In the case of a payment of the excess profits tax shown on the return for a taxable year to which section 780(a) applies, or the payment of a deficiency in respect of the tax for any such taxable year, on or after July 1, 1945, the post-war credit attributable to such payment will not be available for the purchase of bonds, but instead the amount of such post-war credit will be paid to the taxpayer in cash. No interest for the period after December 31, 1945, shall be assessed or collected on that portion of the excess profits tax or deficiency in respect of such tax equal to the amount of the credit under section 780(a) attributable to the payment of such tax or deficiency. The amount of any post-war credit remaining in favor of the taxpayer after January 1, 1946, shall be paid to the taxpayer in cash. Any payment to a taxpayer under section 781(c) of amounts of any post-war credit shall be made by the Commissioner of Internal Revenue. No interest will be allowed or paid upon any payment to a taxpayer under section 781(c).

For provisions relating to reduction of the post-war credit on account of the allowance of a credit for debt retirement, see section 783(c) and section 35.783-1(c).

No income is realized by reason of the receipt by a taxpayer of any payment under section 781(c). Nor is any income realized by a successor by reason of his receipt of any such payment, if, under the provisions of section 113, the outstanding post-war credit with respect to which the payment is made had, for the purpose of determining gain or loss from a sale or exchange, the same basis in the hands of the successor as it would have had in the hands of the taxpayer. Otherwise, income may be realized by the successor from the receipt of such a payment.

(B) By striking out "or 85½ per cent, whichever is applicable" in the third sentence of section 35.781-1(b) and inserting in lieu thereof:

or, in the case of a taxable year beginning in 1943 and ending in 1944, the amount of excess profits tax which would be payable if in the computation under section 710(a)(6)(A) the excess profits tax rate were 81 per cent and in the computation under section 710(a)(6)(B) the excess profits tax rate were 85½ per cent

(C) By striking out subparagraph (4) of section 35.781-1(b).

(D) By striking out examples (5) and (6) in section 35.781-1(b).

PAR. 6. There is inserted immediately preceding section 35.783-1 the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

* * * * *

(g) Section 783 of the Internal Revenue Code is amended by inserting at the end thereof the following new subsection:

"(e) **TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1943.**—The provisions of this section shall not apply to taxable years beginning after December 31, 1943."

* * * * *

PAR. 7. Section 35.783-1, as amended by Treasury Decision 5442, is further amended as follows:

(A) By inserting at the end of section 35.783-1(a) the following:

For provisions making section 783 and the regulations prescribed thereunder inapplicable to taxable years beginning after December 31, 1943, see section 783(e) and section 35.783-1(e).

(B) By striking out example (3) in section 35.783-1(b) and inserting in lieu thereof the following:

Example (3). The excess profits tax imposed upon the W Corporation for the calendar year 1942 is \$500,000, and for the calendar year 1943 is \$300,000. The amounts paid by the corporation in repayment of indebtedness throughout the year 1942 total \$25,000, and throughout the year 1943 total \$150,000. The outstanding indebtedness of the corporation during the years 1942 and 1943 is as follows:

	Paid.	Borrowed.	Total in-debt-ed-ness.
January 1, 1942			\$200,000
September 1			200,000
October 15	\$25,000		175,000
December 5		\$50,000	225,000
December 31			225,000
Total paid	25,000		
January 1, 1943			225,000
March 15		75,000	300,000
November 10	150,000		150,000
December 31			150,000
Total paid	150,000		

The credit allowable for debt retirement for 1942 is zero, computed as follows:
40 per cent of \$25,000, the total repaid in 1942 (see section 783(a) and section 35.783-1(a)) ----- \$10,000

But the credit for debt retirement for 1942 may not exceed whichever of the following amounts is the lesser (see section 783(b) (1) and (3) and section 35.783-1(b) (2)): :

10 per cent of \$500,000 (amount of tax imposed) ----- \$50,000
40 per cent of zero (amount by which indebtedness September 1, 1942, \$200,000, exceeds indebtedness at close of taxable year 1942, \$225,000) ----- zero

The credit allowable for debt retirement for 1943 is \$20,000, computed as follows:

40 per cent of \$150,000, the total repaid in 1943 (see section 783(a) and section 35.783-1(a)) ----- \$60,000

But the credit for debt retirement for 1943 may not exceed whichever of the following amounts is the lesser (see section 783(b) (1) and (2) and section 35.783-1(b)(3)):

10 per cent of \$300,000 (amount of tax imposed)	\$30,000
40 per cent of \$50,000 (amount by which amount of indebtedness September 1, 1942, \$200,000, or smallest amount of indebtedness at close of any preceding taxable year ending after September 1, 1942 (December 31, 1942), \$225,000, whichever amount (\$200,000 or \$225,000) is the lesser, \$200,000, exceeds amount of indebtedness at close of taxable year (December 31, 1943), \$150,000)	20,000

(C) By inserting immediately after section 35.783-1(d) the following:

(e) *Taxable years beginning after December 31, 1943.*—Neither the provisions of section 783 nor the provisions of section 35.783-1, 35.783-2, or 35.783-3 apply to taxable years beginning after December 31, 1943.

PAR. 8. Section 35.783-2(a), as amended by Treasury Decision 5442, is further amended by inserting at the end of the second paragraph thereof the following:

For provisions making section 783 and the regulations prescribed thereunder inapplicable to taxable years beginning after December 31, 1943, see section 783(e) and section 35.783-1(e).

PAR. 9. Section 35.783-3, added by Treasury Decision 5442, is amended as follows:

(A) By inserting at the end of section 35.783-3(a) the following:

For provisions making section 783 and the regulations prescribed thereunder inapplicable to taxable years beginning after December 31, 1943, see section 783(e) and section 35.783-1(e).

(B) By striking out the fourth sentence of section 35.783-3(c)(2) and inserting in lieu thereof the following:

For example, if a corporation is organized on September 30, 1943, and reports its income on the basis of a taxable year ending December 31, 1943, the close of any preceding taxable year shall be deemed to be December 31.

(C) By striking out examples (1) and (2) in section 35.783-3(c)(3) and inserting in lieu thereof the following:

Example (1). On September 30, 1943, the X Corporation merged into the Y Corporation, and the Y Corporation as a part of the merger assumed the outstanding indebtedness of the X Corporation in the amount of \$100,000. The excess profits tax imposed upon the X Corporation for the taxable period of nine months ended September 30, 1943, is \$400,000. The amounts paid by the X Corporation in repayment of indebtedness in 1943 total \$90,000. The outstanding indebtedness of the X Corporation was as follows:

	Paid.	Borrowed.	Total indebtedness.
January 1, 1942			\$200,000
September 1			200,000
December 5	\$25,000		175,000
December 31			175,000
January 1, 1943			175,000
March 15		\$15,000	190,000
June 30	90,000		10C,000
September 30 (before merger)			100,000
September 30 (after merger)			10
Total paid	90,000		

¹ \$100,000 assumed by Y Corporation in the merger ceases to be indebtedness of X Corporation.

The outstanding indebtedness of the X Corporation, as reconstructed in accordance with paragraph (c)(1) for purposes of the computation of the credit for debt retirement of such corporation for the taxable period ended September 30, 1943, is as follows:

	Total indebtedness.
September 1, 1942, \$200,000 (indebtedness of the X Corporation September 1, 1942), minus \$100,000 (indebtedness of X Corporation assumed by Y Corporation in the merger, \$100,000, but not to exceed smallest amount of indebtedness of X Corporation September 1, 1942, or at close of any taxable year of X Corporation ending after September 1, 1942, and prior to the merger (September 1, 1942, \$200,000; December 31, 1942, \$175,000), \$175,000)	\$100,000
December 31, 1942, \$175,000 (indebtedness of X Corporation December 31, 1942), minus \$100,000 (indebtedness of X Corporation assumed by Y Corporation in the merger, after application of the limitation as shown above)	75,000

The credit for debt retirement allowable to the X Corporation for the taxable period ended September 30, 1943, is \$30,000, computed as follows:

40 per cent of \$90,000, the total repaid in 1943 (see section 783(a) and section 35.783-1(a))	\$36,000
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But the credit for debt retirement allowable to the X Corporation for the taxable period ended September 30, 1943, may not exceed whichever of the following amounts is the lesser (see section 783(b) (1) and (2) and sections 35.783-1(b)(3) and 35.783-3(c)(1)):

10 per cent of \$400,000 (amount of tax imposed)	\$40,000
40 per cent of \$75,000 (amount by which amount of indebtedness September 1, 1942, as reconstructed, \$100,000, or smallest amount of indebtedness, as reconstructed, at close of any preceding taxable year ending after September 1, 1942 (December 31, 1942), \$75,000, whichever amount (\$100,000 or \$75,000) is the lesser, \$75,000, exceeds amount of indebtedness at close of taxable year (September 30, 1943), zero)	30,000

The excess profits tax imposed upon the Y Corporation for the fiscal year ended November 30, 1943, is \$500,000 and for the fiscal year ended November 30, 1944, is \$600,000. The amounts paid by the Y Corporation in repayment of indebtedness throughout the fiscal year 1943 total \$100,000 and throughout the fiscal year 1944 total \$150,000. The outstanding indebtedness of the Y Corporation was as follows:

	Paid.	Borrowed.	Total in-debtedness.
December 1, 1941			\$150,000
September 1, 1942			150,000
October 15	\$50,000		100,000
November 30			100,000
December 1, 1942			100,000
July 1, 1943	50,000		50,000
September 30 (before merger)			50,000
September 30 (after merger)			180,000
November 1	50,000		100,000
November 30			100,000
Total paid	100,000		
December 1, 1943			100,000
March 15, 1944		\$50,000	150,000
September 1	100,000		50,000
November 15	50,000		0
November 30			0
Total paid	150,000		

¹ Includes \$100,000 assumed in the merger.

ration in repayment of indebtedness in 1943 total \$100,000. The outstanding indebtedness of the Z Corporation was as follows:

	Paid.	Borrowed.	Total indebtedness.
September 30, 1943			\$250,000
October 15		\$50,000	300,000
December 1	\$100,000		200,000
December 31			200,000
Total paid.		100,000	

¹ Amount assumed in the consolidation.

The outstanding indebtedness of the Z Corporation, as reconstructed in accordance with paragraph (c) (2) for purposes of the computation of the credit for debt retirement of such corporation for the taxable period ended December 31, 1943, is as follows:

	Total indebtedness.
September 1, 1942, zero (indebtedness of Z Corporation September 1, 1942), plus \$200,000 (\$100,000 (indebtedness of X Corporation assumed by Z Corporation in the consolidation, \$100,000, but not to exceed smallest amount of indebtedness of X Corporation September 1, 1942, or at close of any taxable year of X Corporation ending after September 1, 1942, and prior to the consolidation (September 1, 1942, \$200,000; December 31, 1942, \$175,000), \$175,000), plus \$100,000 (indebtedness of Y Corporation assumed by Z Corporation in the consolidation, \$150,000, but not to exceed smallest amount of indebtedness of Y Corporation September 1, 1942, or at close of any taxable year of Y Corporation ending after September 1, 1942, and prior to the consolidation (September 1, 1942, \$150,000; December 31, 1942, \$100,000), \$100,000))	\$200,000
December 31, 1942, zero (indebtedness of Z Corporation December 31, 1942), plus \$200,000 (aggregate indebtedness of X Corporation and Y Corporation assumed by Z Corporation in the consolidation, after application of the limitation as shown above)	200,000

The credit for debt retirement allowable to the Z Corporation for the taxable period ended December 31, 1943, is zero, computed as follows:

40 per cent of \$100,000, the total repaid in 1943 (see section 783(a) and section 35.783-1(a))	\$40,000
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But the credit for debt retirement allowable to the Z Corporation for the taxable period ended December 31, 1943, may not exceed whichever of the following amounts is the lesser (see section 783(b) (1) and (2) and sections 35.783-1(b) (3) and 35.783-3(c) (2)):

10 per cent of \$100,000 (amount of tax imposed)	\$10,000
40 per cent of zero (amount by which amount of indebtedness September 1, 1942, as reconstructed, \$200,000, or smallest amount of indebtedness, as reconstructed, at close of any preceding taxable year ending after September 1, 1942 (December 31, 1942), \$200,000, whichever amount (\$200,000 or \$200,000) is the lesser, \$200,000, exceeds amount of indebtedness at close of taxable year (December 31, 1943), \$200,000)	zero

PAR. 10. There is inserted immediately preceding Subpart IV, as amended by Treasury Decision 5400, approved August 22, 1944 [C. B. 1944, 476], the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

* * * * *

(h) Subchapter E of Chapter 2 of the Internal Revenue Code is amended by adding at the end thereof the following new section:

" SEC. 784. TEN PER CENTUM CREDIT AGAINST EXCESS PROFITS TAX.

" (a) ALLOWANCE.—Against the tax imposed by this subchapter for any taxable year beginning after December 31, 1943, there shall be allowed as a credit an amount equal to 10 per centum of such tax.

" (b) SPECIAL INTEREST PROVISION.—No interest shall be allowed or paid upon any overpayment of tax resulting from the application of subsection (a) to a taxable year ending before December 31, 1945, unless, in the return made for such taxable year, the taxpayer claims a credit under such subsection."

SEC. 35.784-1. TEN PER CENT CREDIT AGAINST EXCESS PROFITS TAX.—(a) *General rule.*—Section 784(a) provides for the allowance of a credit against the excess profits tax imposed for certain taxable years. The taxable years for which such credit is allowable are those beginning after December 31, 1943. The credit under section 784 of a taxpayer for a taxable year is an amount equal to 10 per cent of the excess profits tax imposed upon the taxpayer for such year. For such purpose the tax imposed is the amount of tax determined under Subchapter E of Chapter 2 prior to (1) any credit under section 131, as made applicable by section 729, for tax paid or accrued to a foreign country or possession of the United States and (2) any adjustment under section 734 on account of position inconsistent with prior income tax liability. If it is determined, in the case of any taxpayer with respect to any taxable year for which a credit under section 784 is allowable, that constructive average base period net income should be used pursuant to section 722 in computing its tax, the tax imposed, for the purpose of the 10 per cent credit for such year, is the amount determined pursuant to the preceding sentence after the determination pursuant to such section. But in such case, pending the final determination of the tax pursuant to section 722, the tax imposed shall, for such purpose, be tentatively considered as an amount determined without regard to the determination under section 722, minus the amount, if any, by which the tax payable at the time prescribed for payment is reduced under section 710(a)(5) (relating to deferment of payment of tax in case of claim under section 722). For the purpose of the credit, the tax imposed does not include any interest, penalty, additional amount, or addition to the tax.

(b) *Special interest provision.*—Section 784(b) provides that no interest shall be allowed or paid upon that portion of any overpayment of excess profits tax for a taxable year ending before December 31, 1945, which is attributable to the allowance of a credit under section 784 unless, in the return made for such taxable year, the taxpayer claims a credit under such section. If, however, the taxpayer claims the benefit of a credit under section 784 in its return for a taxable year for which such credit is allowable, the restriction imposed by section 784(b) is not applicable. Hence, where such credit is claimed on the return, an understatement of the amount thereof will not deprive the taxpayer of interest on the resulting overpayment, if interest is otherwise allowable. The term "the return" as used in section 784(b) means the excess profits tax return, including an amended return, filed on or before the due date for such return, or, if the taxpayer fails to file an excess profits tax return on or before the due date, the first return filed thereafter by the taxpayer. The due date of a return is the date on or before which the return is required to be filed in accordance with the provisions of the Internal Revenue Code, or the last day of the period covered by an extension of time granted by the Commissioner or a collector.

REGULATIONS 109.

In order to conform Regulations 109 [Part 30, Title 26, Code of Federal Regulations, 1941 Sup.] to section 3 of the Tax Adjustment Act of 1945 (Public Law 172, Seventy-ninth Congress), approved July 31, 1945, such regulations are amended as follows:

PAR. 11. There is inserted immediately preceding section 30.780-1, as amended by Treasury Decision 5442, approved March 2, 1945, the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

(a) The first sentence of section 780(a) of the Internal Revenue Code is amended by striking out the words "the date of cessation of hostilities

in the present war" and substituting in lieu thereof the following: "December 31, 1943".

(b) Section 780(b) of the Internal Revenue Code is amended by striking out the words "three months before the date of maturity of bonds for such year under subsection (c)" and inserting in lieu thereof the following: "July 1, 1945".

(c) Section 780(c) of the Internal Revenue Code is amended (1) by inserting in the last sentence after the words "to which this section applies" the following: "shall be payable at the option of the owner on or after January 1, 1946, and", and (2) by striking out the last two lines from the table at the end thereof.

* * * * *

PAR. 12. Section 30.780-1(a), as amended by Treasury Decision 5442, is further amended by striking out the second sentence and inserting in lieu thereof:

The taxable years so specified are those ending after December 31, 1941, which begin before January 1, 1944.

PAR. 13. There is inserted immediately preceding section 30.781-1, as amended by Treasury Decision 5442, the following:

SEC. 3. CHANGES IN PROVISIONS RELATING TO POSTWAR REFUND OF EXCESS-PROFITS TAX. (TAX ADJUSTMENT ACT OF 1945, APPROVED JULY 31, 1945.)

* * * * *

(d) Section 781(a) of the Internal Revenue Code is amended by striking out the words "three months before the date of maturity of the bonds for such year" and inserting in lieu thereof the following: "July 1, 1945".

(e) The last sentence of section 781(b) of the Internal Revenue Code is amended by striking out the words "the time of the maturity of bonds issued with respect to such taxable year" and substituting in lieu thereof the following: "January 1, 1946".

(f) Section 781(c) of the Internal Revenue Code is amended to read as follows:

"(c) **TAX PAYMENTS AFTER CUT-OFF DATE.**—In the case of a payment of the tax imposed by this subchapter shown on the return for any taxable year for which a credit is provided in section 780(a), or the payment of a deficiency in respect of such tax for any such taxable year, on or after July 1, 1945, the amount of the credit under section 780(a) for such taxable year attributable to such payment shall be paid the taxpayer in cash. No interest for the period after December 31, 1945, shall be assessed or collected on that portion of the tax or deficiency so paid equal to the credit under section 780(a) attributable to such payment. If after January 1, 1946, there is any credit under section 780(a) remaining in favor of the taxpayer attributable to any taxable year for which a credit is provided in section 780(a), such remainder shall be paid to the taxpayer in cash. No amount of any payment made under this subsection to a taxpayer shall be included in gross income."

* * * * *

PAR. 14. Section 30.781-1(a), as amended by Treasury Decision 5442, is further amended to read as follows:

(a) *Deficiencies; refunds and credits of overpayments; and payments of certain post-war credits in cash.*—In case a deficiency is paid by the taxpayer, or an overpayment is refunded or credited to the taxpayer, for any taxable year to which section 780(a) applies, appropriate adjustments will be made in the post-war credit account of the taxpayer. In such case, whenever the amount of bonds should be increased or reduced, the Commissioner of Internal Revenue shall certify the status of the account to the Secretary in order that appropriate adjustments may be made in the amount of bonds. If the refund or credit of an overpayment was made on or before February 25, 1944 (the date of the enactment of the Revenue Act of 1943), the adjustment of the post-war credit or

bonds of the taxpayer shall be made in accordance with section 781(b) in force prior to such date. If the refund or credit of an overpayment is made after February 25, 1944, such adjustment or, in an appropriate case, the reduction in the amount of the refund or credit of the overpayment of the tax, shall be made in accordance with section 781(b), as amended. Collection from a taxpayer under section 781(b) in force prior to February 25, 1944, of the amount by which charges (arising by reason of a refund or credit of an overpayment) exceed the amount of the post-war credit of the taxpayer shall be made by the Commissioner of Internal Revenue.

In the case of a payment of the excess profits tax shown on the return for a taxable year to which section 780(a) applies, or the payment of a deficiency in respect of the tax for any such taxable year, on or after July 1, 1945, the post-war credit attributable to such payment will not be available for the purchase of bonds, but instead the amount of such post-war credit will be paid to the taxpayer in cash. No interest for the period after December 31, 1945, shall be assessed or collected on that portion of the excess profits tax or deficiency in respect of such tax equal to the amount of the credit under section 780(a) attributable to the payment of such tax or deficiency. The amount of any post-war credit remaining in favor of the taxpayer after January 1, 1946, shall be paid to the taxpayer in cash. Any payment to a taxpayer under section 781(c) of amounts of any post-war credit shall be made by the Commissioner of Internal Revenue. No interest will be allowed or paid upon any payment to a taxpayer under section 781(c).

For provisions relating to reduction of the post-war credit on account of the allowance of a credit for debt retirement, see section 783(c) and section 35.783-1(c) of Regulations 112.

No income is realized by reason of the receipt by a taxpayer of any payment under section 781(c). Nor is any income realized by a successor by reason of his receipt of any such payment, if, under the provisions of section 113, the outstanding post-war credit with respect to which the payment is made had, for the purpose of determining gain or loss from a sale or exchange, the same basis in the hands of the successor as it would have had in the hands of the taxpayer. Otherwise, income may be realized by the successor from the receipt of such a payment.

(This Treasury decision is issued under the authority contained in section 62 of the Internal Revenue Code (53 Stat., 32; 26 U. S. C., 1940 ed., 62), as made applicable by section 729(a) of the Internal Revenue Code (54 Stat., 989; 26 U. S. C., 1940 ed., 729(a)), and section 3 of the Tax Adjustment Act of 1945 (Public Law 172, Seventy-ninth Congress).)

W.M. T. SHERWOOD,
Acting Commissioner of Internal Revenue.

Approved January 24, 1946.

JOSEPH J. O'CONNELL, Jr.,
Acting Secretary of the Treasury.

(Filed with the Division of the Federal Register January 25, 1946, 3.49 p. m.)

SECTION 1141.—COURTS OF REVIEW.

(Also Section 23(b), Section 19.23(b)-1; Section 115, Section 19.115-1.)

1946-3-12229
Ct. D. 1660

INCOME TAX—INTERNAL REVENUE CODE—DECISION OF SUPREME COURT.

1. GROSS INCOME—DEDUCTIONS—INTEREST—DISTRIBUTIONS BY CORPORATIONS—DIVIDENDS—FINALITY OF TAX COURT DECISION.

The conclusions of The Tax Court that certain payments which the taxpayer corporations made to holders of their corporate obligations were interest to creditors in the one case and dividends to stockholders in the other, the principal difference in the two cases being that in

the former the obligations bore 8 per cent noncumulative interest and in the latter cumulative interest fluctuating from 2 per cent to 10 per cent, are final under the rule of *Dobson v. Commissioner* (320 U. S., 489 [Ct. D. 1597, C. B. 1944, 56]). The words "interest" and "dividends" as used in the tax statutes are well understood, and The Tax Court is fitted to decide whether the annual payments under these corporate obligations are to be classified as interest or dividends.

2. DECISIONS AFFIRMED AND REVERSED.

Decision of the United States Circuit Court of Appeals, Seventh Circuit (146 Fed. (2d), 466), reversing decision of The Tax Court (1 T. C., 457), reversed; decision of the United States Circuit Court of Appeals, First Circuit (146 Fed. (2d), 809), affirming decision of The Tax Court (3 T. C., 95), affirmed.

SUPREME COURT OF THE UNITED STATES.

36. *The John Kelley Co., petitioner, v. Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

47. *Talbot Mills, petitioner, v. Commissioner of Internal Revenue.*

On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 7, 1946.]

OPINION.

Mr. Justice REED delivered the opinion of the Court.

These writs of certiorari were granted to examine the deductibility as interest of certain payments which the taxpayer corporations made to holders of their corporate obligations. Although the obligations of the two taxpayers had only one striking difference, the noncumulative in one and the cumulative quality in the other of the payments reserved under the characterization of interest, The Tax Court (formerly the Board of Tax Appeals, 56 Stat., 957; only its present name will be used herein) held that the payments under the former, the Kelley Company case, were interest and under the Talbot Mills were dividends. The circuit court of appeals reversed The Tax Court in the Kelley case and another circuit affirmed the Talbot Mills decision.¹ On account of the diversity of approach in The Tax Court and the reviewing courts, we granted certiorari.

In the Kelley case, a corporation, all of whose common and preferred stock was owned directly or as trustee by members of a family group, was reorganized by authorizing the issue of \$250,000 income debenture bearer bonds, issued under a trust indenture, calling for 8 per cent interest, noncumulative. They were offered only to shareholders of the taxpayer but were assignable. The debentures were payable in 20 years, December 31, 1956, with payment of general interest conditioned upon the sufficiency of the net income to meet the obligation. The debenture holders had priority of payment over stockholders but were subordinated to all other creditors. The debentures were redeemable at the taxpayer's option and carried the usual acceleration provisions for specific defaults. The debenture holders had no right to participate in management. Other changes not material here were made in the corporate structure. Debentures were issued to the amount of \$150,000 face value. The greater part, \$114,648, was issued in exchange for the original preferred, with 6 per cent cumulative guaranteed dividends, at its retirement price and the balance sold to stockholders at par, which was eventually paid with sums obtained by the purchasers from common stock dividends. Common stock was owned in the same proportions by the same stockholders before and after the reorganization.

In the Talbot Mills case the taxpayer was a corporation which, prior to its recapitalization, had a capital stock of 5,000 shares of the par value of \$100 or \$500,000. All of the stock with the exception of some qualifying shares was held by members, through blood or marriage, of the Talbot family. In an effort to adjust the capital structure to the advantage of the taxpayer, the company was recapitalized just prior to the beginning of the fiscal year in question, by each stockholder surrendering four-fifths of his stock and taking in lieu thereof

¹ T. C., 457; 146 Fed. (2d), 466; certiorari granted, 325 U. S., —; Judicial Code, section 240(a). 3 T. C., 95; 146 Fed. (2d), 809; certiorari granted, 325 U. S., —; Judicial Code, section 240(a).

registered notes in aggregate face value equal to the aggregate par value of the stock retired. This amounted to an issue of \$400,000 in notes to the then stockholders. These notes were dated October 2, 1939, and were payable to a specific payee or his assignees on December 1, 1964. They bore annual interest at a rate not to exceed 10 per cent nor less than 2 per cent, subject to a computation that took into consideration the net earnings of the corporation for the fiscal year ended last previous to the annual interest paying date. There was, therefore, a minimum amount of 2 per cent and a maximum of 10 per cent due annually and between these limits the interest payable varied in accordance with company earnings. The notes were transferable only by the owner's endorsement and the notation of the transfer by the company. The interest was cumulative and payment might be deferred until the note's maturity when "necessary by reason of the condition of the corporation." Dividends could not be paid until all then due interest on the notes was satisfied. The notes limited the corporation's right to mortgage its real assets. The notes could be subordinated by action of the board of directors to any obligation maturing not later than the maturity of the notes. For the fiscal year in question the maximum payment of 10 per cent was made on the notes.

The payments in question on corporate obligations were for the years in the Kelley case, 1937, 1938 and 1939; in the Talbot Mills case for the year 1940. Both corporations deducted the payments as interest from their reports of gross income under statutory sections and regulations set out in the footnote.² The applicable statutes and regulations were identical for all periods. The Commissioner asserted deficiencies because the payments were considered dividends and not interest.

There is not present in either situation the wholly useless temporary compliance with statutory literalness which this Court condemned as futile, as a matter of law, in *Gregory v. Helvering* (293 U. S. 465 [Ct. D. 911, C. B. XIV-1, 193 (1935)]). The demonstrated possibility of sales by the holders of the obligations to persons other than stockholders alone proves the differentiation. As material amounts of capital were invested in stock, we need not consider the effect of extreme situations such as nominal stock investments and an obviously excessive debt structure.

From the foregoing statements of facts, it appears that the characteristics of all the obligations in question and the surrounding circumstances were of such a nature that it is reasonably possible for determiners to reach the conclusion that the secured annual payments were interest to creditors in one case and dividends to stockholders in the other case. In the Kelley case there were sales of the debentures as well as exchanges of preferred stock for debentures, a promise to pay a certain annual amount, if earned, a priority for the debentures over common stock, the debentures were assignable without regard to any transfer of stock, and a definite maturity date in the reasonable future. These indicia of indebtedness support The Tax Court conclusion that the annual payments were interest on indebtedness. On the other hand, in the Talbot Mills case, The Tax Court found the factors there present of fluctuating annual payments with a 2 per cent minimum, the limitation of the issue of notes to stockholders in exchange only for stock, to be characteristics which distinguish the Talbot Mills notes from the Kelley Company debentures. Upon an appraisal of all the facts, The Tax Court reached the conclusion that the annual payments by Talbot Mills were in reality dividends and not interest.

² Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(b) INTEREST.—All interest paid or accrued within the taxable year on indebtedness.

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) DEFINITION OF DIVIDEND.—The term "dividend" when used in this chapter (except in section 203(a)(3) and section 207(c)(1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year *

Treasury Regulations 103.

Sec. 19.23(b)-1. INTEREST.—Interest paid or accrued within the year on indebtedness may be deducted from gross income,

* * * * *

So-called interest on preferred stock, which is in reality a dividend thereon, can not be deducted in computing net income.

(See Revenue Acts of 1936 and 1938, 49 Stat., 1648, 1659, 52 Stat., 447, 460, and Treasury Regulations 94, article 23(b)-1, and 101, article 23(b)-1.)

EMPLOYMENT TAXES.

INTERNAL REVENUE CODE.

CHAPTER 9, SUBCHAPTER C.—FEDERAL UNEMPLOYMENT TAX ACT.

SECTION 1607: Definitions. 1946-3-12232
REGULATIONS 107, SECTION 403.204: Who are Mim. 5967
employees.
(Also Social Security Act, Section 907;
Regulations 90, Article 205.)

Status for Federal employment tax purposes of corporate officers who perform no services or only nominal or minor services and who receive no compensation.

Mimeograph 5723 revoked and Mimeograph 4880 [C. B. 1939-1 (Part 1), 312] modified.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington 25, D. C., January 4, 1946.

Collectors of Internal Revenue and Others Concerned:

1. It has been the position of the Bureau heretofore that officers of corporations and of organizations taxable as corporations who perform no services and receive no compensation are to be counted nevertheless as employees for purposes of the tax imposed by Title IX of the Social Security Act and by the Federal Unemployment Tax Act on employers of eight or more. (Mim. 5723 dated June 27, 1944.) This position was based on the provisions of section 1101(a)(6) of the Social Security Act and section 1607(i) of the Federal Unemployment Tax Act and has been supported by the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Nicholas v. The Richlow Manufacturing Co.* (126 Fed. (2d), 16). The foregoing provisions of the respective Acts state that "The term 'employee' includes an officer of a corporation," and the court considered this language a sufficient basis for holding the officer involved in the case before it to have been an employee for purposes of the Social Security Act, without applying the usual tests of the employer-employee relationship. Several court decisions involving the Bureau's position on this subject subsequently have been handed down and have resulted in reconsideration of that position.

CASE OF DEECY PRODUCTS CO. V. WELCH.

2. In *Deecy Products Co. v. Welch* (C. C. A. 1, 124 Fed. (2d), 592), the court held, in effect, that a corporate officer is not an employee unless he meets the tests determinative of the ordinary employment relationship. This case involved the status of an individual who, if counted as an employee, rendered the company liable to tax for the calendar year 1936 under Title IX of the Social Security Act as an

employer of eight or more. The individual in question did the necessary legal work when the corporation was organized in 1923 under the laws of Massachusetts, has been its attorney ever since and in that capacity receives compensation. At the time of organization he was elected statutory clerk, an office required under the laws of the State, and held that office until 1937. As clerk he prepared the minutes of meetings and signed them. According to his testimony no annual meetings were held during some years but in most years the annual meeting of stockholders was held followed by the annual meeting of directors, both of which he attended, prepared the minutes, and signed them. During 1936 the total time expended by him in attending the meetings was a little over half an hour and dictation of the minutes required five minutes, these services comprising his total duties and services as clerk during the calendar year. No charge was made for his services as clerk, these being incidental to his duties as attorney for the corporation. Under the by-laws of the corporation the clerk is required to attend meetings of the stockholders and of the directors; to record upon the corporate book of records the proceedings of the respective meetings; to notify the stockholders and directors of their respective meetings, in accordance with the by-laws; and to perform such other duties as the directors shall from time to time prescribe.

3. Although the court disagreed with the Government's contention that the clerk, as an officer, was an employee solely because of the provisions of section 1101(a)(6) of the Social Security Act, the view was expressed, in effect, that nevertheless those provisions and the fact that he was an officer did not prevent him from being an employee within the meaning of the Act if he met the ordinary employment relationship tests. The court expressly stated its intention not to lay down any precise definition of such relationship, considering that the boundaries limiting the relationship appeared with sufficient clarity to permit it to determine the clerk's status. The undisputed facts and observations upon which the court based its conclusion that the clerk was an employee of the corporation are, in substance, that he performed services for the corporation; that the short period of time required in performing the services did not make it any less a rendering of services; that obviously, he was clerk during the entire year and if the directors or stockholders saw fit to meet more often, his work might have assumed greater proportions; that his serving as clerk was a necessary incident of the conduct of the corporation's business under the State laws; that his services as clerk can not be said to have been a gratuitous undertaking, being incidental to his work as the corporation's attorney, in which capacity he was paid; that while he may not have received any identifiable compensation as clerk he did not serve without consideration; that it is hard to think that he would have acted as clerk if he had not been the corporation's attorney; that from the standpoint of control and supervision, the clerk was subject to the board of directors and the board could direct him in the performance of the duties of his office and prescribe duties other than those specified in the by-laws; that it could not be said that he had no superiors in the corporation who could give him orders and the powers of the board were not nullified by the fact that he was the only one familiar with the legal procedure involved; and that here the clerk was subject to control as to the acts that constituted the execution of his agency.

CASE OF INDEPENDENT PETROLEUM CORPORATION V. FLY.

4. The court in *Independent Petroleum Corporation v. Fly* (C. C. A. 5, 141 Fed. (2d), 189) held that an unpaid corporate officer, who performed only nominal services, is not to be counted as an employee. The officer involved in this case, the wife of the president, was elected secretary of the corporation and held that office throughout the year 1938. Upon its organization all shares of the corporation were issued to the president except one which for organizational purposes was issued, but not delivered, to his wife, the secretary. Recovery of the tax paid for the year 1938 under Title IX of the Social Security Act was sought by the corporation on the ground that the secretary was not an employee and without her it was not an employer of eight or more.

5. The corporation's secretary actually had no connection with the business and gave no attention to it; her husband, as president and general manager and sole owner, performed all the duties both of president and secretary, except that in 1938 she signed two tax returns and the minutes of an annual stockholders' meeting which had been prepared by her husband and were presented to her for signature at their home; she never performed any duty provided by the corporate by-laws except to sign the three instruments referred to above; she received no salary, wages, or other compensation, directly or indirectly, and did nothing else whatever for the corporation.

6. In concluding that the secretary was not to be counted as an employee the court expressed the view, in substance, that it was the Congressional intent in defining the term "employee" in the Social Security Act as including an officer of a corporation, to convey the meaning that officers were not to be excluded as employees if they were really employed by the corporation. The opinion of the court was that the wording of the definition did not necessarily mean that all officers of a corporation are employees but only such as worked for it in fact. Being of this opinion, the court determined that the secretary was not an individual in the employ of the corporation in any common or usual understanding of the words, having on only one or possibly two occasions done anything for it.

CASE OF NATIONAL WOODEN BOX ASSOCIATION V. UNITED STATES.

7. The Court of Claims, citing the two foregoing decisions and the decision in the case of *Magruder v. Yellow Cab Co. of D. C., Inc.* (141 Fed. (2d), 324), and stating that its conclusion was in accord with those decisions, also held in *National Wooden Box Association v. United States* (59 Fed. Sup., 118) that unpaid corporate officers, performing only nominal services, are not to be counted as employees for purposes of Title IX of the Social Security Act and the Federal Unemployment Tax Act. This case involved the status of the association's president, three vice presidents, and its treasurer, the contention being made by the association that none of these individuals was its employee and that without them it was not subject to tax under either Act as an employer of eight or more during the years 1936 to 1939, inclusive.

8. As found by the court the facts, so far as material here, are that not counting as employees its president, three vice presidents, or its

treasurer, the association did not have in excess of seven employees at any time during the years involved. The duties of the president of the association, a nonprofit unincorporated trade association of wooden box manufacturers, were to preside over the annual meetings and to write occasional letters. For this he received no remuneration and was entitled to none. In some instances where he made a trip to preside over a meeting, exclusively for that purpose, he was reimbursed his actual traveling expenses by the association and no more. The three vice presidents performed no duties, received no remuneration, and were entitled to none. Their official position was essentially an honorary one. The treasurer countersigned checks upon the association's bank of deposit. Under an arrangement with the bank such checks were to be valid only when countersigned either by the treasurer or by a previously designated member of the association's board of governors. Except for the countersigning of checks, the staff of employees at the association's office and place of business performed the actual work normally done by a treasurer. No remuneration was received by the treasurer from the association and he was entitled to none.

9. The business of the association actually was conducted by the secretary-manager, who was employed by the board of governors, worked under their supervision, and received a salary for his services. No office facilities, clerical assistants, or tools with which to perform any duties, were provided for the president, vice presidents, and treasurer. The latter officers, who were members of the board of governors, did not hire the employees, fix their wages, or discharge them, those duties being performed by the secretary-manager, nor did they determine the policies of the association, as the board of governors performed that function.

10. On the basis of the foregoing facts the court held that the association was not liable for the tax. It was the court's opinion, in substance, that for purposes of measuring the tax on total wages and counting employed individuals in determining whether the association was an employer of eight or more, it would seem that, in levying the tax on such an employer, Congress had in mind only individuals who were paid compensation. The observation was made in this connection that the tax being measured by total wages paid, a corporate officer who received no compensation did not increase the tax burden on a corporation subject to the tax and it would seem inconsistent to count such an officer in order to bring the corporation within the class subjected to the tax. It was further observed that there can be no enforceable contract of employment without an agreement to pay compensation in some form, as otherwise there would be no consideration for the contract; that unless the officers here involved received some sort of remuneration having a cash value, they were not employees as that word was evidently used in the Act; and it was agreed that they received no compensation having a cash value. With reference to the Government's contention that these officers must be included as employees in view of the provisions of section 1101(a)(6) of the Social Security Act, and the similar provisions of section 1607(i) of the Federal Unemployment Tax Act, that "The term 'employee' includes an officer of a corporation," the court took the view that this conclusion does not follow. It was pointed out that the word "employee" ordinarily denotes a subordinate person and is frequently construed to ex-

3. In the regulations applicable to the above-mentioned exceptions from "employment," the expression "officer or member of the crew of a vessel" is stated to include the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. The word "vessel" is stated to include every description of watercraft or other contrivance used as a means of transportation on water. (Article 206(3) of Regulations 90; article 10 of Regulations 91; and section 403.211 of Regulations 107.)

4. Certain types of vessels are equipped and operated primarily for use in dredging, driving piles, canning fish, or other activities in which some of the employees aboard the vessels perform only incidental services in connection with transportation or navigation. In the past the Bureau of Internal Revenue ordinarily regarded as officers or members of the crews of such vessels only those employees who had substantial duties in aid of navigation or transportation, as distinguished from those employees who had little or no connection with the operation and welfare of the craft as vessels or vehicles of transportation. The following published rulings were made on that basis:

S. S. T. 209, C. B. 1937-2, 428.

The employer owns floating pile drivers, barges and dredges, and employs individuals to serve thereon as dock builders, caisson builders, concrete mixers, carpenters, etc., in connection with the construction of piers and docks. The Bureau ruled that such employees are not members of the crew of such vessels.

S. S. T. 244, C. B. 1938-1, 433.

The employer owns a cannery which is located on board one of its vessels. A full crew is signed for the navigation of the vessel. Additional individuals such as superintendents, clerks, machinists, and others are employed in the operation of the cannery and the canning of fish therein. Such individuals are not required to sign the ship's articles but are subject to the authority of the master of the ship. The Bureau ruled that such individuals are not members of the crew of the vessel.

S. S. T. 283, C. B. 1938-1, 437.

An individual is employed as shipkeeper during the winter months when a vessel is frozen in. The crew is disbanded, and the shipkeeper is left in complete charge of the vessel, his duties being to protect it generally, shovel snow off the hatches, and care for the cargo. The Bureau ruled that the shipkeeper is not an officer or member of the crew.

5. Reconsideration of the published rulings referred to above results in the determination that they are erroneous when considered in the light of the decision in *Berwind-White Coal Mining Co. v. Rothensies* (137 Fed. (2d), 60), in which the United States Circuit Court of Appeals for the Third Circuit stated, in part, that "A crew is the comple-

ment necessarily aboard for the welfare and customary operation of a vessel."

6. The expression "officer or member of the crew of a vessel," as used for Federal employment tax purposes, includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, (a) whose primary duties require his service and continued presence on the vessel or its auxiliary equipment, (b) whose services there contribute in any way to the welfare and *customary operation* of the vessel, and (c) whose services are performed in the employ of the owner or operator of the vessel. The "customary operation" of a vessel includes any and every function which the vessel is equipped or intended to perform. The number of individuals serving on a vessel is immaterial; an individual serving alone may be an "officer or member of the crew" if his services otherwise meet the conditions stated above. Certain employees such as longshoremen, however, whose primary duties do not require their continued presence on vessels, may perform services on a vessel without becoming members of the crew.

7. The services described in S. S. T. 244 (cannery on vessel), and in S. S. T. 283 (shipkeeper), are performed by employees who, in serving on board and in contributing to the *customary operation* of the vessels, are officers or members of the crews of such vessels. In S. S. T. 209, however, the services of dock builders, caisson builders, concrete mixers, and carpenters are not described in sufficient detail for a determination whether or not such individuals are members of crews. The customary operations of the vessel, and the nature of services performed by employees in connection with such operations, are controlling factors for a determination of the status of such employees. A carpenter, for example, is not a member of the crew of a vessel if his primary duties require his presence on land or on structures which are a part of the land, and his presence on the vessel is casual. On the other hand, if the customary operations of a vessel require the continued presence of a carpenter on board the vessel, then such carpenter is a member of the crew if he otherwise meets the conditions stated in the first sentence of paragraph 6, above. Whether such an employee is an "officer or member of the crew of a vessel" must in doubtful cases be determined upon an examination of the particular facts of each case.

8. S. S. T. 209, S. S. T. 244, and S. S. T. 283 are revoked.

9. Inquiries relating to this mimeograph should refer to the number thereof and to the symbols A&C: RR.

Wm. T. SHERWOOD,
Acting Commissioner.

TAXES UNDER SOCIAL SECURITY ACT.

TITLE IX.—TAX ON EMPLOYERS OF EIGHT OR MORE.

SECTION 907: Definitions.

REGULATIONS 90, ARTICLE 205: Employed individuals.

Uncompensated officers. (See Mim. 5967, page 32.)

power of a decedent to terminate a trust so as to bring the trust estate within his gross estate for purposes of the transfer tax imposed by section 302(d) of the Revenue Act of 1926 (ch. 27, 44 Stat., 9, 71). The Court, finding it unnecessary to determine that question, disposed of the case upon another ground. The question is here again, this time inescapably, but with a further legislative history and a somewhat different setting of fact.

In 1936, immediately following the White decision, Congress revised section 302(d) by rewriting it into two separate paragraphs relating to "revocable transfers," one applying to transfers after June 22, 1936, the other to transfers on or prior to that date. These are now sections 811(d) (1) and (2) of the Internal Revenue Code, which are set forth in the margin.¹ For present purposes the difference claimed to be important consisted in changing the phrase "to alter, amend, or revoke" applying to transfers on or prior to June 22, 1936, so that in section 811(d)(1) it reads "to alter, amend, revoke, or terminate," as to transfers after that date.

However section 811(d)(2) governs the transfer in this case, since it was made in January, 1935, prior to the dividing date. And the question most mooted has been whether the change was one of substance or was only a clarifying amendment. Put differently, the principal issue is whether power to "alter, amend, or revoke" included power merely to terminate the interests created by the trust or required some further change.

The Tax Court and the Circuit Court of Appeals for the Fifth Circuit, one judge dissenting, have ruled that the change was substantial, not merely declaratory. (3 T. C., 571; 148 Fed. (2d), 740.) Accordingly they have held that no deficiency resulted from the taxpayer's failure to include the value of the trust estate created by the decedent Holmes in his gross estate for estate tax purposes. The Commissioner maintains the contrary view. Because of alleged conflict with decisions from other circuits,² certiorari was granted. (— U. S., —.)

We think The Tax Court and the court of appeals were in error in their view of the statute's effect.

The facts were stipulated. In so far as necessary to state, they are as follows. On January 20, 1935, by a single trust indenture Holmes created three several irrevocable trusts, one for each of three sons then aged 22, 19 and 14 years respectively. Each was given the beneficial interest in one-third of a common fund consisting of corporate stock later converted into other assets.³ The three trusts were identical in terms. Holmes was named and acted as trustee until his death October 5, 1940.

Each trust was to continue for a period of 15 years, unless earlier terminated under power reserved to the grantor, or for a longer term on specified conditions summarized below. But the grantor reserved to himself during his lifetime the power to terminate any or all of the trusts and distribute the principal, with

¹ SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(d) REVOCABLE TRANSFERS.—

(1) TRANSFERS AFTER JUNE 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

(2) TRANSFERS ON OR PRIOR TO JUNE 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includable under this paragraph; (26 U. S. C. section 811.)

² Mellon v. Driscoll (117 Fed. (2d), 477 (C. C. A. 3)); Commissioner v. Hoffheimer's Estate (149 Fed. (2d), 733 (C. C. A. 2)). See also the authorities cited in note 11 infra.

³ The corporation which had issued the stock was liquidated and the corporate assets were transferred to the trust to replace the stock.

accumulated income, to the beneficiaries then entitled to receive it.⁴ He retained no power to revest in himself or his estate any portion of the corpus or income.

Various provisions for disposition over were made to cover contingencies created by the death of beneficiaries during continuance of the trust. Generally stated, the scheme was that the surviving issue of each son should take his share of the corpus, receiving it share and share alike, unconditionally if over 21; as beneficiaries until attaining that age, if under it. If a son should die without issue, his "share or trust" was to go "pro rata" to the other two sons, or their surviving issue *per stirpes*; if either other son should be dead without issue, the survivor or his issue was to take the whole; and if all the sons should be deceased without issue, whatever might remain in the trust estate was given to the grantor's wife, if living; if not, to her heirs at law. The trust was to terminate in any event upon the death of the last survivor of the three sons and the expiration of 21 years thereafter.

The trustee was given broad discretionary power to apply each beneficiary's share of the corpus for his maintenance, welfare, comfort or happiness, with a precatory suggestion of liberality.

The income was subject to spendthrift provisions and discretionary power of accumulation. If not accumulated, it was to be distributed to the beneficiary, preferably in monthly installments.

The principal contention is that the sum of the various provisions was to create or reserve to the decedent only a power to accelerate in time the enjoyment of the beneficial interests brought into being by the trusts; that these were vested interests; that no power was reserved to revest them or any of them in the donor or his estate or to change or alter them, or the terms of the gifts, in any manner other than by mere acceleration of enjoyment; and that the powers thus reserved are not sufficient to bring the trust estate, or any part of it, within the coverage of section 811(d) (2).⁵

This view presupposes two things. One is that termination of contingencies upon which enjoyment is dependent does not "change, alter, or revoke" enjoyment; the other, that the power "to alter, amend, or revoke" specified in section 811(d) (2) does not include a power to terminate contingencies which accelerate enjoyment, with the effect of making certain that the beneficiary taking will have it rather than others to whom it would or might inure if termination were longer deferred.

One difficulty with respondent's position is in its conception of "enjoyment." More than once recently we have emphasized that "enjoyment" or "enjoy," as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates. (Cf. *United States v. Pelzer*, 312 U. S., 399, 403 [Ct. D. 1495, C. B. 1941-1, 441]; *Fondren v. Commissioner*, 324 U. S., 18, 20 [Ct. D. 1627, I. R. B. 1945-4, 18]; *Commissioner v. Disston*, 325 U. S., — [Ct. D. 1642, I. R. B. 1945-12, 28].)⁶ In this sense it is clear that none of the sons here had a present right to immediate enjoyment of either income or principal (see *Commissioner v. Disston*, *supra*).

⁴ The power of termination was reserved by paragraph 11 of the indenture, as follows:

"Grantor, during his lifetime, and my son or sons herein named, while acting as trustee hereunder, may, if deemed advisable by them as trustee, distribute to either of grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder. And grantor may, during his lifetime, if deemed advisable by him, and my son or sons herein named, while acting as trustee hereunder, may, if deemed advisable by them as trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and distribute the principal of the trust to the persons entitled to receive the same under the terms hereof on the date of such termination."

It seems questionable on the wording that the grantor's power of termination, like that of his sons, was limited by the clause "while acting as trustee hereunder." See note 13 and text.

⁵ The taxpayer asserts that each son acquired, on execution of the indenture, "a fee simple title to one-third of the trust corpus and income," subject only to the trustee's power of management for 15 years at the most and to the son's living until this power should end. The reserved power of termination, it is said, applies only to the several contingencies which might affect the time of enjoyment, but not enjoyment itself.

⁶ It is true that this case is not one involving the taxability of gifts of "future interests in property" as was true of the cases cited. It is likewise true that the laws relating to estate taxes and those relating to gift taxes are not completely reciprocal. (*Estate of Sanford v. Commissioner*, 308 U. S., 39 [Ct. D. 1426, C. B. 1939-2, 340]; *Smith v. Shaughnessy*, 318 U. S., 176 [Ct. D. 1575, C. B. 1943, 1144].) But there can be no difference in the meaning of the words "enjoyment" and "enjoy" as they are used in the pertinent statutory provisions respectively.

MISCELLANEOUS.

OLEOMARGARINE.

1946-3-12234
MS. 295

Schedule of oleomargarine produced and materials used during the month of December, 1945, as compared with December, 1944.

	December, 1945.	December, 1944.
	<i>Pounds.</i>	<i>Pounds.</i>
Total production of uncolored oleomargarine.....	1 41, 101, 982	2 49, 413, 585
Total withdrawn tax-paid.....	41, 388, 957	50, 237, 466
Ingredient schedule of uncolored oleomargarine:		
Butter flavor.....	679	1, 933
Citric acid.....	133	243
Corn oil.....	615, 330	1, 011, 630
Cottonseed oil.....	14, 415, 335	21, 521, 723
Cottonseed stearine.....	655	45
Derivative of glycerine.....	84, 142	87, 356
Diacetyl.....	74	99
Estearine.....	8, 582	7, 798
Lecithin.....	49, 574	57, 881
Milk.....	6, 884, 845	8, 773, 283
Monostearine.....	26, 139	35, 692
Neutral lard.....	233, 426	634, 173
Oleo oil.....	228, 129	562, 340
Oleo stearine.....	290, 792	215, 476
Oleo stock.....	13, 610	85, 366
Peanut oil.....	1, 290, 453	440, 119
Salt.....	1, 266, 685	1, 560, 966
Soda (benzoate of).....	26, 252	29, 923
Soya bean oil.....	16, 331, 108	15, 612, 513
Soya bean stearine.....		2, 922
Tallow.....	1, 800	
Vitamin concentrate.....	9, 596	8, 364
Total.....	41, 777, 330	50, 649, 845
Total production of colored oleomargarine.....	\$ 3, 341, 287	3, 010, 200
Total withdrawn tax-paid.....	1, 618, 602	2, 169, 948
Ingredient schedule of colored oleomargarine:		
Butter flavor.....	27	23
Color.....	2, 500	5, 043
Corn oil.....	311	2, 368
Cottonseed oil.....	626, 717	826, 715
Derivative of glycerine.....	4, 776	2, 814
Diacetyl.....	12	4
Estearine.....	510	184
Lecithin.....	2, 333	1, 819
Milk.....	535, 570	517, 211
Monostearine.....	602	1, 645
Neutral lard.....	112, 566	52, 243
Oleo oil.....	306, 639	30, 645
Oleo stearine.....		1, 500
Oleo stock.....		15, 950
Peanut oil.....	12, 940	401
Salt.....	104, 454	98, 333
Soda (benzoate of).....	1, 820	1, 585
Soya bean oil.....	1, 637, 966	1, 481, 371
Soya flakes.....		400
Vitamin concentrate.....	1, 082	350
Total.....	3, 350, 825	3, 040, 604

NOTE.—The figures for December, 1945, and December, 1944, are subject to revision until published in the Commissioner's annual report.

¹ Of the amount produced, 6,277 pounds were reworked.

² Of the amount produced, 9,727 pounds were reworked.

³ Of the amount produced, 24 pounds were reworked.

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The Internal Revenue Bulletin service for 1946 will consist of bi-weekly bulletins and semiannual cumulative bulletins.

The biweekly bulletins will contain the rulings and decisions to be made public and all Treasury Department decisions (known as Treasury decisions) pertaining to Internal Revenue matters. The semi-annual cumulative bulletins will contain all rulings and decisions (including Treasury decisions) published during the previous 6 months.

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	First 6 months.	Second 6 months.	
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1923-	II-1	II-2	30, 40
1924-	III-1	III-2	50, 50
1925-	IV-1	IV-2	40, 35
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	¹ Part 2	—	\$1
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All inquiries in regard to these publications and subscriptions should be sent to the Superintendent of Documents, Government Printing Office, Washington 25, D. C.

No. 11,049.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOOPER C. DUNBAR, GORDON B. MORRIS and CRAIG C.
HORTON, Trustees of Bell View Oil Syndicate, a Trust,

Appellees.

BRIEF FOR THE APPELLEE.

A. CALDER MACKAY,
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HOWARD W. REYNOLDS,
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No. 11,049.

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOOPER C. DUNBAR, GORDON B. MORRIS and CRAIG C.
HORTON, Trustees of Bell View Oil Syndicate, a Trust,

Appellees.

BRIEF FOR THE APPELLEE.

Opinion Below.

The District Court rendered no opinion. The findings of fact and conclusions of law are not reported. [R. 67-72.]

Jurisdiction.

This appeal involves federal unemployment taxes for the years 1936 to 1939, inclusive. Taxpayers on September 22, 1942, filed claims for refund of said taxes and interest and penalties paid thereon in the aggregate amount of \$204.41. [R. 31-35.] Said claims were rejected by the Commissioner of Internal Revenue by letter dated July 12, 1943. [R. 56-59.] On October 27, 1943, taxpayers filed a complaint in the United States District Court,

Southern District of California, Central Division, under the provisions of subsection (20) of Section 24 of the Judicial Code as amended, praying for judgment against the United States for \$204.41 plus interest. [R. 2-24.] The Government filed its answer on February 28, 1944. [R. 25-29.] The District Court on December 1, 1944, filed its findings of fact and conclusions of law and rendered judgment. [R. 67-74.] On December 18, 1944, amended judgment was entered in favor of taxpayers for \$204.41 with interest thereon according to law. [R. 75-76.] The case is brought to this Court by Notice of Appeal filed by the appellant on February 27, 1945, pursuant to the provisions of Section 128(a) of the Judicial Code, as amended. [R. 78.]

Question Presented.

The question presented is whether this Court should reverse the decision of the District Court which held that the trustees of Bell View Oil Syndicate, a trust estate, are not employees and that their remuneration is not subject to the excise tax imposed by Section 901 of the Social Security Act and Section 1600 of the Internal Revenue Code.

Statutes and Regulations Involved.

These are set forth in the appendix to the Government's brief, pages 1-3.

Statement.

This case involves only one issue:

The taxes assessed and collected by the Government under Title IX of the Social Security Act were based upon the remunerations received by appellees for their services as trustees of Bell View Oil Syndicate, a trust estate upon the ground that the trustees were employees, whereas no employer-employee relationship existed between the trust or the holders of beneficial interests and these trustees; therefore no tax should have been assessed upon the trustees' remunerations.

Statement of Facts.

The statement contained in the brief of appellant sets out the relevant facts, and they need not be repeated here.

Summary of Argument.

The tax imposed by Title IX of the Social Security Acts and Section 1600 of the Internal Revenue Code is an excise on the relation of employment. Unless the trustees here involved are employees of some employer, no tax attaches to their remuneration.

The trustees are not employees of any person. They are independent principals subject to no control except the provisions of the trust instrument and principles of equity. They are fiduciaries and not servants.

In addition, the question of the existence of an employment relation is a question of fact. That question of fact has been determined by the court below in favor of the appellees. Such determination should not be set aside here unless clearly erroneous. The facts in the record show the lower court's determination to be clearly right.

ARGUMENT.

PART I.

The Trustees of Bell View Oil Syndicate, a Trust Estate, Did Not Render Services in the Relationship of Employee to Employer Within the Meaning of the Social Security Act, and Therefore No Excise Tax Should Have Been Imposed Upon Their Remunerations.

The Social Security Act imposes an excise tax upon employers. For the years from 1936 to 1939 this provision is contained in the Act itself, at 42 U. S. C. A., Sec. 1004, and for subsequent years it is incorporated into the Internal Revenue Code at Section 1600. The excise is placed upon an employer "with respect to having individuals in his employ." The Act (42 U. S. C. A., Section 1011(b)) defines "employment" to mean "any service, of whatever nature, performed within the United States by an employee for his employer, * * *." The Act attempts no definition of either "employer" or "employee" as those words are used in the Act. Nowhere in the Act is there any indication that the terms "employer," "employee" or "employment" are used in other than their natural and normal signification.

It is well settled that the natural and usual meaning of plain terms is to be adopted as the legislative intent in a statute in the absence of a clear showing that something else was intended. *United States v. First National Bank*, 234 U. S. 245, 34 S. Ct. 846, 58 L. Ed. 1298; *Avery v. Commissioner of Internal Revenue*, 292 U. S. 210, 54 S. Ct. 674, 78 L. Ed. 1216. Congress is presumed to have used a word in a statute in its usual and well settled sense. *United States v. Stewart*, 311 U. S. 60, 61 S. Ct. 102, 85

L. Ed. 40. Consequently when Congress used the term "employee" in the Social Security Act, without more, it must have intended that the term be understood according to its common acceptation, and with reference to the common law wherein the term "employee" has acquired a definite and well established meaning. Indeed, where the question has arisen in regard to the Social Security Act, the courts have defined the term "employee" in accordance with the common law concept. In *Texas Co. v. Higgins* (C. C. A. 2, 1941, 118 F. (2d) 636, at page 638, Judge Learned Hand said:

"Were the question presented to us for the first time, we should have no doubt that Thomas and his assistants were not 'employees' of the plaintiff; the act appears to take over the term as the common law knew it, and at common law they would not be employees. The regulation is in harmony with this assumption, for it enumerates the generally accredited determinants in such cases, of which the most important is the putative employer's control over the employee's business. * * *

It was there held that the individual rendering services was not an employee under the Social Security Act because the element of control by his alleged employer was lacking.

Persuasive evidence as to the meaning of "employee" as that term was used by Congress in Title IX of the Social Security Act is the interpretation placed upon the word by the regulations promulgated thereunder by the Treasury Department. (Regulations 107, Section

403.204.) This is the definition contained in the Commissioner's regulations:

"Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. * * *

"Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. * * *" (Italics in original.)

Thus the regulations do no more than reiterate the familiar common law principles, and they place particular emphasis upon control or the right to control as the test which evidences the relationship.

The Government here, however, is contending for a different definition. On page 10 of its brief it is stated:

"It is the position of the Government, however, that the proper meaning of the term is not to be determined solely by reference to common law standards, but rather must be found by considering the purposes of the Act and the circumstances in which it is sought to be applied."

Since the purpose of the Act is to alleviate unemployment as much as possible, the Government argues that if the person rendering services is subject to the vicissitudes of idleness or lack of occupation, even in a purely hypothetical sense, as in the case of these trustees, he is an employee within the meaning of the Act, although as to him the incidents of the employment relation in the usual and ordinary sense do not exist. This definition of the term "employee" is not supported by the Act itself, by the regulations of the Treasury Department, or by the decided cases.

It has been uniformly held by the courts in construing the Social Security Act that the words "employer," "employee," and "employ," used in the statute, are intended to describe the conventional relation of employer and employee. *Texas Co. v. Higgins, supra*; *Indian Refining Co. v. Dallman*, 119 F. (2d) 417, (C. C. A. 7, 1941), affirming D. C. 31 F. Supp. 455; *United States v. Griswold, et al.* (C. C. A. 1, 1941), 124 F. (2d) 599; *Anglim v. Empire Star Mines Co.* (C. C. A. 9, 1942), 129 F. (2d) 914; *Magruder, Collector, v. Yellow Cab Co. of D. C., Inc.* (C. C. A. 4, 1944), 141 F. (2d) 324; *United States v. Aberdeen Aerie No. 24 of Fraternal Order of Eagles* (C. C. A. 9, 1945), 148 F. (2d) 655; *Burruss, et al. v. Early*, 44 Fed. Supp. 21. Whenever the test has not been met it has been held that the individual was not an employee. And as we have pointed out above, the most important determinant is the existence of the right to control the putative employee. If there is no right to control an individual by the person who is alleged to be his employer, he is not an employee, and this is so whether the alleged employer be an individual, a corporation, or an association taxable as a corporation for Federal Income Tax

purposes. Appellant falls far short of making its case by asserting that this trust is an association within the meaning of Section 1101(a) of the Internal Revenue Code.

The facts here are clear and undisputed. These trustees acquired legal title to the trust estate under a written declaration of trust dated January 20, 1922. [R. 30, 35.] The important terms of the trust declaration are as follows: The instrument gives the trustees exclusive management and control of the trust estate with power to make contracts and conveyances relating to the trust estate, to compromise claims, to hold legal title to the trust estate, to employ counsel, to develop and operate oil properties and to act by majority vote of the trustees. [R. 37, 39.] The remaining trustees are given power to fill any vacancies occasioned by the death or resignation or refusal to act of any trustee. [R. 41.] The trustees are given power to fix their own remunerations, provided that their fees and other office and overhead expenses are not to exceed ten per cent of the gross income of the trust. [R. 40.] The trustees are not to be liable for any mistake in judgment and their liability is confined to willful breach of the trust imposed upon them under state law. [R. 41.] They have no power to bind unit holders. [R. 40.] They are appointed for life or the duration of the trust. [R. 37.] They may employ and remove such officers, agents and employees as they deem necessary. [R. 46.] The only voting right held by the holders of the beneficial interests is in respect to consenting to the alteration or amendment of the trust agreement or the termination thereof. [R. 48.] The trustees in the management of the trust are not subject to direction or control by the unit holders, by the trust estate, or by any other

—9—

person. The District Court so found in its Findings of Fact. [R. 70.] In all ways they conduct themselves as principals and legal owners of the trust estate, and this also was found by the court below. [R. 70.] Such finding accords with both the evidence and the law, and should therefore be taken as conclusive in this case.

Appellant cites *Morrissey v. Commissioner*, 296 U. S. 344, 56 S. Ct. 289, 80 L. ed. 263. The Supreme Court there, in dealing with a business trust, at page 359 said that the trustees thereof act "in much the same manner as directors." See also *Hecht v. Malley*, 265 U. S. 144, 161, 44 S. Ct. 462, 68 L. ed. 949.

The Commissioner of Internal Revenue has consistently adhered to the view that directors of corporations are not employees. Reg. 107, Sec. 403.204. Thus the fact that these trustees constitute an association for certain federal tax purposes is immaterial.

The trust here is simply the collective designation of the trustees. It is not a separate legal entity. *Hecht v. Malley, supra*. In making contracts for the trust and in all their other actions, these trustees do not act as agents. They are principals and are personally liable upon their contracts, except so far as they protect themselves by contract against individual liability. As a matter of fact, they are the trust.

The trial judge in this case made the following finding of fact, which apparently is not objected to or questioned by the Government. [R. 70.] "They [the trustees] acted at all times as principals and as owners of the trust estate. They were not subject to direction or control by any other person or persons and in performing their duties under the trust instrument they did not act as the agents or

employees for any person or persons." It has been held by this Court that the existence of an employment relation is a question of fact. *Swayne & Hoyt, Inc. v. Barsch* (C. C. A. 9), 226 Fed. 581. Consequently, the finding of the Court below was a finding of fact which should not be set aside. A finding of fact is not to be set aside "unless clearly erroneous." (Rule 52, Rules of Civil Procedure for the District Courts of the United States.)

The Restatement of the Law of Agency, Section 14(c) states:

"There are many relationships in which one acts for the benefit of another which are to be distinguished from agency by the fact that there is no control by the beneficiary. * * * A trustee, that is, one holding property in trust for another and subject to equitable duties to deal with the property for the other's benefit, may or may not be subject to control in the management of the property by the one for whose benefit he is required to act. If he is so subject, he is also an agent, and the Rules stated in the Restatement of this subject apply to him."

Under the foregoing rule these trustees are neither agents nor employees of the trust. When the precise question here involved was presented to the Court, it was held that the trustees were not employees within the purview of the Social Security Act. *United States v. Griswold, supra.* Appellant apparently concedes that the facts in that case are not distinguishable from the facts here. The trust there was a Massachusetts business trust, and was treated as a corporation for taxing purposes under the Internal Revenue Code. The Circuit Court held an employee to be one who meets the established concept of

the legal relationship of employer and employee. At page 601, the Court said:

“The relationship of employer and employee in the ordinary sense does not exist here. These trustees render services and receive compensation, but we do not feel that they are subject to such supervision and control as to make them employees within the scope of the Congressional intent.”

The Supreme Judicial Court of Massachusetts has reached the same conclusion under the Massachusetts Unemployment Compensation law. *Griswold, et al. v. Director of Division of Unemployment Compensation and Division of Employment Security*, 315 Mass. 371, 53 N. E. (2d) 108. The Court said in part:

“The obligation of an employer to the unemployment fund is based upon the relation of employer and employee; and where, as here, there is nothing in our law indicating anything to the contrary, the existence of such a relationship must be determined by the principles of the common law.” (p. 109.)

“* * * The trustees are not subject to any control of the shareholders. They have no superiors in the conduct of the business of the trust. They manage the affairs of the trust in accordance with the agreement and declaration of trust as they in their discretion and judgment deem appropriate. They are the masters and principals in the business of the trust. They have the legal title to the trust property and none other than the trustees can do any act that affects the rights or property of the trust. * * *”

The Court concluded:

“The trustees [of a business trust] are not employees of such a trust.” (p. 109.)

Appellant cites *Carroll v. Social Security Board*, 128 F. (2d) 876, as being in opposition to the views which have been held by the cases above cited. A reading of the case, however, shows that the court was not departing from the principles which have generally been held. There was no serious contention in that case that the individual in question was not an employee. The defense rather was that he was an employee of the State of Illinois, and as such, exempt from the Act under 42 U. S. C. A., Sec. 1107(c)(6). It was held that the bank and not the State was the employer of this admitted employee. The Court distinguishes the case of *United States v. Griswold, supra*, upon the ground that the right to control by the putative employer which was lacking there, was present, pointing out that the individual in question was subject to removal at the pleasure of the bank's creditors. The cases of *Lehigh Valley Coal Co. v. Yensavage*, 218 Fed. 547, and *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170, cited by appellant, were decided with reference to entirely different statutes enacted under different conditions and for different purposes. In view of the well-settled construction by the courts of the Social Security Act, these cases cannot add or detract from the definition of "employee" as established by the decisions under this Act.

Appellant also cites *Grace v. Magruder*, 148 F. (2d) 679 (App. D. C.), and *United States v. Vogue, Inc.*, 145 F. (2d) 609 (C. C. A. 4). The first case involved coal hustlers and the second seamstresses. In both cases, the individuals worked under conditions of employment, whereby their respective employers, had they so desired, would have been able to have exerted substantial control over them. In addition, in the *Vogue* Case the

employer furnished the working quarters and even a sewing machine to one of the women. They observed the same working hours as the regular employees and had no key to the establishment. The work was furnished by the employer, who collected from the customer and paid the seamstresses a percentage of collections. This Court distinguished the *Vogue* Case in *United States v. Aberdeen Aerie No. 24 of Fraternal Order of Eagles, supra*. In the *Grace* case, although no express contract of employment existed, the court found the hustlers worked under "compelling supervision" as a result of the practice of the employer in paying them. These cases, it is submitted are distinguishable upon the facts and offer no guide to the nature of the relationship occupied by these trustees, in respect to whom entirely different circumstances exist.

It is also contended by the appellant that the Senate Finance Committee having twice failed to take favorable action on a bill which would have clarified the status of trustees of Massachusetts business trusts, Congress is thereby presumed to have approved S. S. T. 136, 1937-1 Cum. Bull. 377, wherein it is contended by the Commissioner that such trustees are employees. There is no indication that the lower house of Congress was ever made aware of the existence of this bill. In the Senate Hearings before the Committee on Finance on H. R. 6635, Social Security Act Amendments, 76th Cong. 1st Sess., pp. 105-114, it affirmatively appears that the sponsor of the bill had not presented it to the House Ways and Means Committee because there was not time enough. No bill was introduced on the floor of the lower house. Thus, from the non-action of a committee of one of the houses of Congress, the appellant presumes the intent of Congress is evidenced.

The additional fact appears that the bill as presented to the Committee was defective. In the letter of the Treasury Department upon the bill (84 Cong. Record, Part 8, pp. 9030, 9031) it is pointed out to the Committee that the remuneration of trustees would be included for purposes of the benefits provided by Title II of the Act, but would not be subject to the taxes imposed by Title VIII of the Act (subsequently incorporated into the Internal Revenue Code). Thus, such trustees, the Treasury contended, would be eligible for benefits under the Act, without being subject to the tax which is imposed. It may well be that the only intent of the Committee was to avoid such an incongruous result.

However, if presumptions are to be indulged in, it would seem that the construction placed upon the Act by the taxpayers is the one of which Congress has indicated approval. The published regulations reiterate the common law definition of the term "employee." (Reg. 107, Sec. 403.204.) It is much more likely that Congress would be acquainted with them rather than with an obscure and inconsistent ruling. By failing to amend the Act, Congress has indicated its approval of the interpretation of the term "employee" contained in the regulations and the decided cases. It has been stated as a rule of construction that where Congress has not amended a law, it must be taken that the construction placed upon it by the courts is the true construction, acceptable to the legislative as well as the judicial branch of the Government. *Baltimore & Ohio Railroad Company v. John Baugh*, 149 U. S. 368, 13 S. Ct. 914, 37 L. Ed. 772. As we have shown the courts have followed the usual common law definition of the term "employee." In the *Griswold Case*, at page 601, the Court expressly declared S. S. T. 136, 1937-1 C. B. 377 to be an erroneous interpretation of the statute.

Finally, it appears that the contention of the Government that a new definition of the term "employee" should be adopted, because of the remedial purposes of the Social Security Act, has already been answered by this Court in the case of *Anglim v. Empire Star Mines Co., Ltd.*, *supra*. In that case the individuals involved were miners and might with much more reason be thought to be employees than these trustees who are more nearly in the nature of partners or independent business enterprisers. However, this Court applied the established common law test and held the individuals not to be employees because the alleged employer had no right to control their acts.

Speaking through Judge Healy, the Court states:

"* * * It [the Government] argues further that since the tax provisions are integral parts of the remedial system of old age and survivors insurance enacted to promote the general welfare, the term 'employee' should have a liberal interpretation to effect the legislative purpose.

"However, in defining the required relationship, and in drawing the distinction between an employee and an independent contractor, the regulations do no more than reiterate the familiar principles of the common law. Cf. Restatement, Agency, Secs. 2, 220. Such has been the view uniformly taken of them by the courts in cases arising under the statute. *Texas Co. v. Higgins*, 2 Cir., 118 F. (2d) 636; *Indian Refining Co. v. Dallman*, 7 Cir., 119 F. (2d) 417, affirming D. C., 31 F. Supp. 455; *Williams v. United States*, 7 Cir., 126 F. (2d) 129; *Jones v. Goodson*, 10 Cir., 121 F. (2d) 176.

"* * * We are not unmindful of the beneficent purposes of the Act, but the extension of its benefits to wider fields is not the business of the courts."

It is to be noted that the cases which speak of the Congressional intent in the light of the remedial and beneficial purpose of the Act have nevertheless found as a matter of fact that the right to control did exist, and have done no more than apply the usual common law test. Regarding intent, however, it is unrealistic, to say the least, to assume that the framers of the Act had in mind independent business enterprisers such as these trustees.

Conclusion.

The decision of the Court below is right and should be affirmed.

Respectfully submitted,

A. CALDER MACKAY,

ARTHUR McGREGOR,

HOWARD W. REYNOLDS,

CHARLES J. HIGSON,

Attorneys for the Appellees.

No. 11051 - *HJ*

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Appellant,

vs.

UNITED STATES OF AMERICA and H. F. METCALF, Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., a corporation, bankrupt,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 26 1945

**PAUL P. O'BRIEN,
CLERK**

No. 11051

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national banking association,

Appellant,

vs.

UNITED STATES OF AMERICA and H. F. METCALF, Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., a corporation, bankrupt,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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Los Angeles 13, Calif. [A*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California
Central Division

No. 25308-M-In Bankruptcy

In the Matter of

F. P. NEWPORT CORPORATION, LTD..
a corporation,

Bankrupt.

[SECURITY-FIRST NATIONAL BANK'S
EXHIBIT NO. 1—BY REFERENCE]

TRUST NO. SS-70401
DECLARATION OF TRUST

This Declaration of Trust made and entered into as of the 1st day of March, 1930, by and between F. P. Newport Corporation, Ltd., (a Delaware Corporation), party of the first part, hereinafter sometimes referred to as the "Beneficiary", Security-First National Bank of Los Angeles, a national banking association, organized and existing pursuant to an Act of Congress of the United States, and having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, party of the second part, hereinafter sometimes referred to as the "Trustee", and Security-First National Bank of Los Angeles, Banking Department, party of the third part, hereinafter sometimes referred to as the "Payee";

Witnesseth:

That, Whereas, the Beneficiary is now indebted to the Payee in the principal sum of Seven Hundred Sixty Thousand Dollars (\$760,000.00) as is evidenced by a certain promissory note dated March 1st, 1930, made and executed by F. P. Newport Corporation, Ltd., a Delaware Corpo-

ration, in favor of said Payee and delivered by the above named Beneficiary to said Payee in words and figures as follows, to-wit: [126]

"\$760,000.00

Los Angeles, California,

March 1st, 1930

On or before March 1st, 1932, for value received, F. P. Newport Corporation, Ltd., a Delaware Corporation, promises to pay the Security-First National Bank of Los Angeles, a national banking association, Banking Department, or order, at its Security Office, Fifth and Spring Streets, Los Angeles, California, the sum of Seven Hundred Sixty Thousand Dollars (\$760,000.00), with interest from the date hereof until paid at the rate of seven per cent (7%) per annum, payable quarterly, and reasonable attorney's fees if suit be commenced or other proceedings taken to enforce the payment of this note.

Should the interest not be so paid, when due, it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States of America, of the present standard. The makers and endorsers of this note hereby waive diligence, demand, protest and notice and consent to extensions of time.

This note is secured by that certain Declaration of Trust issued by the Security-First National Bank of Los Angeles, a national banking association, as Trustee, dated as of the 1st day of March, 1930,

known as its Trust No. SS-70401, which note *is* made and accepted subject to each and all of the terms and provisions of said Declaration of Trust applicable thereto, which terms and provisions by reference are made a part hereof.

F. P. NEWPORT CORPORATION, LTD.

Corporate

By F. P. Newport

Seal

President

By T. L. Dudley

Secretary"

The Trustee hereunder shall be under no obligation as to the payment of either the principal or interest due the Payee, except as to the applications thereto of moneys [127] coming into its hands for that purpose as hereinafter provided; and

Whereas, by deed dated March 1st, 1930, to be hereafter recorded in the office of the County Recorder of Los Angeles County said F. P. Newport Corporation, Ltd. conveyed, and does hereby grant, unto the Security-First National Bank of Los Angeles, a national banking association, in trust, with power of sale, all that real property situate in the County of Los Angeles, State of California, described as follows:

Group or Parcel 1: — Subdivided Property

I. In Tract No. 250, as per map recorded in Book 15 pages 130 and 131 of Maps, records of said County:

- (A) East 50 feet of the West 100 feet of Lot 21;
- (B) All that portion of Lot 22 lying Westerly of a line drawn parallel with the Westerly line of Niodrara Drive and distant 189 feet Westerly therefrom; (22.J)

- (C) All that portion of Lot 103 of said Tract, in the City of Glendale, and a portion of Avenue "F" as vacated by the City of Glendale by Resolution No. 1084, adopted October 9th, 1919, described as follows:

Beginning at a point in the Northerly line of Glorieta Avenue, as shown on Map of Selvas de Verdugo, recorded in Book 37 page 77 of Maps, in the office of the County Recorder of said County, distant thereon South $88^{\circ} 36'$ West 100 feet from the intersection of the Southerly prolongation of the Easterly line of said Lot 103 with the Northerly line of said Glorieta Avenue; thence along said Northerly line of Glorieta Avenue South $88^{\circ} 36'$ West 50 feet; thence parallel with the Easterly line of said Lot 103 Northerly $1^{\circ} 24'$ West 130 feet; thence parallel with said Glorieta Avenue north $88^{\circ} 36'$ East 50 feet; thence parallel with the Easterly line of said Lot 103 South $1^{\circ} 24'$ East 130 feet to the point of beginning; (103-C)

- (D) That part of Lot 175 of said Tract in the City of Glendale, described as follows:

Beginning at the Northeast corner of said Lot 175; thence South $1^{\circ} 24'$ East along the Easterly line of said Lot 175, a distance of 163.46 feet to the Southeast corner of said Lot 175; thence North $71^{\circ} 31'$ West along the Southerly line of said Lot 175 a distance of 55.00 feet; thence North $0^{\circ} 20' 7''$ West 155.53 feet to a point on the Northerly line of said Lot 175 distant thereon North $78^{\circ} 59'$ West 50.00 feet from the Northeast corner of said Lot 175;

thence South 78° 59' East 50.00 feet to the point
of beginning. (175-A) [128]

- (E) That part of Lot 175 of said Tract in the City of Glendale, described as follows:

Beginning at a point on the North line of said Lot 175 distant thereon North $78^{\circ} 59'$ West 50.00 feet from the Northeast corner of said Lot 175; thence South $0^{\circ} 20' 07''$ East 155.53 feet to a point on the Southerly line of said Lot 175 distant thereon North $71^{\circ} 31'$ West 55.00 feet from the Southeast corner of said Lot 175; thence North $71^{\circ} 31'$ West 55.00 feet more or less, along the Southerly line of said Lot 175, to a point which is South $71^{\circ} 31'$ East 59.25 feet from the Southwest corner of said Lot 175; thence North $0^{\circ} 55' 57''$ East 147.67 feet to a point on the Northerly line of said Lot 175, distant thereon South $78^{\circ} 59'$ East 50.00 feet from the Northwest corner of said Lot 175; thence South $78^{\circ} 59'$ East 50.00 feet, more or less, to the point of beginning; and (175-B)

- (F) That part of Lot 175 of said Tract in the City of Glendale, described as follows:

Beginning at the Northwest corner of said Lot 175, thence South $78^{\circ} 59'$ East along the Northerly line of said Lot 175 a distance of 50.00 feet; thence South $0^{\circ} 55' 57''$ West 147.67 feet to a point in the Southerly line of said Lot 175, distant thereon South $71^{\circ} 31'$ East 59.25 feet from the Southwest corner of said Lot 175; thence North $71^{\circ} 31'$ West 59.25 feet to the Southwest corner of said Lot 175; thence North $3^{\circ} 56'$ East along the Westerly line of said Lot

175 a distance of 138.75 feet to the point of beginning. (175-C)

- (G) That part of Lot 178 of said Tract in the City of Glendale described as follows:

Beginning at a point on the Southerly line of said Lot 178 distant thereon North $64^{\circ} 19'$ West 60.00 feet from the Southeast corner of said Lot 178, thence North $1^{\circ} 00' 54''$ East 151.92 feet more or less to a point on the Northerly line of said Lot 178, distant thereon North $71^{\circ} 31'$ West 50.00 feet from the Northeast corner of said Lot 178; thence North $71^{\circ} 31'$ West along the Northerly line of said Lot 178 a distance of 50.00 feet; thence South $3^{\circ} 46' 15''$ West 142.05 feet, more or less, to a point on the Southerly line of said Lot 178, distant thereon North $64^{\circ} 19'$ West 120.00 feet from the Southeast corner of said Lot 178; thence South $64^{\circ} 19'$ East 60 feet to the point of beginning.

(178-B)

- (H) That part of Lot 179 of said Tract in the City of Glendale, described as follows:

Beginning at the Northeast corner of said Lot 179, thence North $78^{\circ} 07'$ West along the Northerly line of said Lot 179, a distance of 45.60 feet, more or less to a point on the Northerly line of said Lot 179, distant thereon South $78^{\circ} 07'$ East 140.00 feet from the Northwest corner of said Lot 179; thence South $9^{\circ} 07' 34''$ West 139.24 feet to a point on the Southerly line of said Lot 179, distant thereon South $81^{\circ} 15'$ East 160.00 feet from the Southwest corner of said Lot 179; thence South 81°

15' East along the Southerly line of said Lot 179, a distance of 39.18 feet to the point of beginning of a curve concave Southerly, having a radius of 234.64 feet, a radial line from said point bearing South $8^{\circ} 45'$ West: thence [129] Easterly along said curve a distance of 19.34 feet to the Southeast corner of said Lot 179; thence North $3^{\circ} 56'$ East along the Easterly line of said Lot 179, a distance of 138.35 feet to the point of beginning. (179-A)

- (I) Those portions of Lot 179 of said Tract in the City of Glendale, described as follows:

(a) Beginning at a point on the Southerly line of said Lot 179, distant thereon South 81° 15' East 160.00 feet from the Southwest corner of said Lot 179; thence North 9° 07' 34" East 139.24 feet, more or less, to a point on the Northerly line of said Lot 179 distant thereon South 78° 07' East 140.00 feet from the Northwest corner of said Lot 179; thence North 78° 07' West along the Northerly line of said Lot 179 a distance of 50.00 feet; thence South 11° 09' 57" West 142.10 feet, more or less, to a point on the Southerly line of said Lot 179, a distance thereon of South 81° 15' East .105.00 feet from the Southwest corner of said Lot 179; thence South 81° 15' East along the Southerly line of said Lot 179, a distance of 55.00 feet to the point of beginning.

(b) Beginning at a point on the Southerly line of said Lot 179, distant thereon South $81^{\circ} 15'$ East 105.00 feet from the Southwest corner of said Lot 179; thence North $11^{\circ} 09' 57''$ East 142.10 feet more or less to a point on the North-

erly line of said Lot 179 distant thereon South $78^{\circ} 07'$ East 90.00 feet from the Northwest corner of said Lot 179; thence North $78^{\circ} 07'$ West along the Northerly line of said Lot 179 a distance of 45.00 feet; thence South $15^{\circ} 05' 37''$ West 145.32 feet, more or less, to a point on the Southerly line of said Lot 179, distant thereon South $81^{\circ} 15'$ East 50.00 feet from the Southwest corner of said Lot 179; thence South $81^{\circ} 15'$ East along the Southerly line of said Lot 179 a distance of 55.00 feet to the point of beginning. (179-C)

(c) Beginning at the Southwest corner of said Lot 179, thence South $81^{\circ} 15'$ East along the Southerly line of said Lot 179 a distance of 50.00 feet; thence North $15^{\circ} 05' 37''$ East 145.32 feet, more or less, to a point on the Northerly line of Lot 179, distant thereon South $78^{\circ} 07'$ East 45.00 feet from the Northwest corner of said Lot 179; thence North $78^{\circ} 07'$ West along the Northerly line of said Lot 179, a distance of 45.00 feet to the Northwest corner of said Lot 179; thence South $16^{\circ} 56'$ West along the Westerly line of said Lot 179, a distance of 148.40 feet to the point of beginning. (179-D)

(J) That part of Lot 181 of said Tract in the City of Glendale, described as follows:

Beginning at the Southwest corner of said Lot 181; thence South $81^{\circ} 15'$ East along the Southerly line of said Lot 181 a distance of 56.00 feet; thence North $19^{\circ} 04' 09''$ East 163.49 feet, more or less, to a point on the Northerly line of said Lot 181, distant thereon South $78^{\circ} 07'$ East 55 feet from the [130] Northwest corner

of said Lot 181; thence North 78° 07' West along the Northerly line of said Lot 181, a distance of 55.00 feet to the Northwest corner of said Lot 181; thence South 19° 15' West along the Westerly line of said Lot 181 a distance of 166.64 feet to the point of beginning. (181-C)

Except that portion deeded to the City of Glendale for street and highway purposes to be known as "Sierra Place".

in Said Tract No. 250
Excepting From All of Said Land / All Water
in and Underneath the Same.

- II. Tract No. 393, in the City of Glendale, in said County and State, as per map recorded in Book 14 page 154 of Maps, records of said County: Lot 39.
- III. Tract No. 1473, in said County and State, as per map recorded in Book 20 pages 154 and 155 of Maps, records of said County:
Lots 66, 75, 76, 192, 193, 194, 195, 196, 205, 206, 207, 208, 209 and 234.
- IV. Tract No. 2016, in said County and State, as per map recorded in Book 27 pages 16, 17 and 18 of Maps, records of said County:
Lot 20 in Block 1; Lots 21, 23 and 28 in Block 4; Lots 22 and 28 in Block 7; Lots 19, 21, 22 and 27 in Block 8; Lot 7 in Block 9; Lots 15 and 21 in Block 20; Lot 17 in Block 22; Lot 4 in Block 23; Lot 15 in Block 28 and Lot 13 in Block 29.

Note: For description of the triangular parcel of land at the Northeast corner of Tract No. 2016 (being part of Lot 6 of a portion of Maria

Dolores Dominguez de Watson allotment)—See paragraph XV, page 4-g hereof) [131]

V. Tract No. 2052, sheets 1 and 2, in said County and State, as per map recorded in Book 28 pages 67 and 68 of Maps, records of said County:

Lot 16.

VI. Tract No. 4044, in the City of Glendale, said County and State, as per map recorded in Book 43 page 79 of Maps, records of said County: Lots 1, 2, 3, 4, 6, 7, 20 and 27.

VII. Tract No. 5719, in said City of Glendale, County and State, as per map recorded in Book 63 page 53 of Maps, records of said County: Lots 1, 2 and 3.

VIII. Tract No. 6158, in said County and State, as per map recorded in Book 137 pages 63 and 64 of Maps, records of said County:
Lots 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 23 and 25 to 52 both inclusive.

IX. Tract No. 6409, in the City of Glendale, said County and State, as per map recorded in Book 114 pages 3 and 4 of Maps, records of said County:

Lots 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, and 62.

X. Tract No. 7146, in said County and State, as per map recorded in Book 76 page 15 of Maps, records of said County:

(A) That part of Lot 4 of said Tract, in said County and State, described as follows:

Beginning at a point on the Southerly line of said Lot 4, distant North $88^{\circ} 36'$ East 40 feet from the Southwest corner of said Lot; thence North $3^{\circ} 09'$ West parallel with the Westerly line of said lot, 100 feet to a point on the Northerly line of said lot; thence North $88^{\circ} 36'$ East, along said Northerly line 24.99 feet to the Northeast corner of said lot; thence South $13^{\circ} 31' 20''$ East along the Easterly line of said Lot 8367 feet to the point of beginning of a curve concave Northwesterly and having a radius of 15 feet; thence Southwesterly along said curve a distance of 26.74 feet to a point on the Southerly line of said Lot 4; thence South $88^{\circ} 36'$ West 24.84 feet to the point of beginning.

- (B) That part of Lot 5 of said Tract, in said County and State, described as follows:

Beginning at a point in the Northerly line of said Lot 5, distant North $88^{\circ} 36'$ East 40 feet from the Northwest corner of said Lot 5: thence South $3^{\circ} 09'$ East parallel with the Westerly line of said Lot 5, a distance of 91.69 feet to a point on the Southerly line of said Lot; thence North $83^{\circ} 51' 10''$ East along said Southerly line 64.88 feet to the Southeast corner [132] of said Lot; thence North $13^{\circ} 31' 20''$ West along the Easterly line of said lot, a distance of 72.08 feet to the point of beginning of a curve concave Southwesterly having a radius of 20 feet; thence Northwesterly along said curve a distance of 27.18 feet to a point in the Northerly line of said lot; thence South $88^{\circ} 36'$ West 32.77 feet to beginning.

- (C) That part of Lot 8 of said Tract, in said County and State, described as follows:

Beginning at a point in the Northerly line of said Lot 8, distant North $83^{\circ} 51' 10''$ East 90.08 feet from the Northwest corner of said Lot 8; thence South $3^{\circ} 09'$ East, parallel with the Westerly line of said Lot 8, 83.66 feet to a point on the Southerly line of said lot; thence South $89^{\circ} 39'$ East along said Southerly line 19.81 feet to the point of beginning of a curve concave Northwesterly and having a radius of 15 feet; thence Northeasterly along said curve a distance of 25.96 feet to a point in the Easterly line of said lot; thence along the said Easterly line North $8^{\circ} 49' 10''$ West 23.20 feet to an angle point in said Easterly line; thence North $13^{\circ} 31' 20''$ West 47.40 feet to the Northeast corner of said lot; thence South $83^{\circ} 51' 10''$ West 24.84 feet to the point of beginning.

- (D) That part of Lot 9 of said Tract, in said County and State, described as follows:

Beginning at the Southeast corner of said Lot 9; thence South $85^{\circ} 45' 30''$ West, along the Southerly line of said lot, 50.82 feet; thence North $3^{\circ} 09'$ West, parallel with the Westerly line of said Lot, 108.92 feet to a point in the Northerly line of said lot; thence South $89^{\circ} 39'$ East along said Northerly line 27.68 feet to the point of beginning of a curve concave Southwesterly, having a radius of 15 feet; thence Southeasterly along said curve a distance of 21.16 feet to a point in the Easterly line of said lot; thence South $8^{\circ} 49' 10''$ East along said Easterly

line, 89.73 feet to the point of beginning of a curve concave Westerly and having a radius of 212.80 feet; thence Southerly along said curve a distance of 3.50 feet to the point of beginning.

- (E) That part of Lot 12 of said Tract, in said County and State, described as follows:

Beginning at a point in the Northerly line of said lot distant North $85^{\circ} 45' 30''$ East 79.98 feet from the Northwest corner of said lot; thence South $3^{\circ} 09'$ East parallel with the Westerly line of said lot, 90.37 feet to a point in the Southerly line of said lot, said point being situated on a curve concave Southerly and having a radius of 145 feet, a radial line from said point bearing South $9^{\circ} 36' 09''$ West; thence Easterly along said curve a distance of 20.85 feet to the point of beginning of a curve concave Northerly and having a radius of 15 feet, a radial line from said point bearing North $17^{\circ} 49' 20''$ East; thence Easterly along said curve a distance of 23.97 feet to a point in the Easterly line of said lot, said point being the point of beginning of a curve concave Westerly and having a radius of 212.80 feet, a radial line from said point bearing North $73^{\circ} 43' 21''$ West; thence Northerly along said curve a distance of 89.71 feet to the Northeast [133] corner of said lot; thence South $85^{\circ} 45' 30''$ West 50.82 feet to the point of beginning.

- (F) That part of Lot 13 of said Tract, in said County and State, described as follows:

Beginning at a point on the Southerly line of said lot distant North $88^{\circ} 36'$ East 40 feet

from the Southwest corner of said lot; thence North 3° 09' West parallel with the Westerly line of said lot, 125.64 feet to a point in the Northerly line of said lot, said point being situated on a curve concave Southerly and having a radius of 115 feet, a radial line from said point bearing South 7° 09' 33" East; thence Easterly along said curve a distance of 47.84 feet to the point of beginning of a curve concave Southwesterly and having a radius of 15 feet, a radial line from said point bearing South 16° 42' 35" West; thence Southeasterly along said curve a distance of 24.45 feet to a point in the Easterly line of said lot; thence South 20° 05' 45" West along said Easterly line 108.24 feet to the Southeast corner of said lot; thence South 88° 36' West 13.03 feet to the point of beginning.

Except all water percolating through all of the said land in said Tract 7146.

XI. Dominguez Harbor Tract in said County and State, as per maps recorded in Books 12 and 22 pages 14 and 176, respectively, of Maps, records of said County, as follows:

Lot 6 in Block 1,	as per map recorded in Book 22 page 176;
Lot 4 in Block 7,	" " " " " " " " ;
Lot 1 in Block 9,	" " " " " " " " ;
Lot 5 in Block 25,	" " " " " 12 " 14;
Lots 4, 7 and 35 in Block 29,	" " " " " 22 " 176;

XII. Fernbrook Place, in the City of Glendale, said County and State, as per map recorded in Book 84 page 73 of Maps, records of said County:
Lots 1, 2, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21,
22 and 23 in Block "A"; and
Lots 3, 6, 11, 12 and 13 in Block "B";
Excepting all water in or under said land.

XIII. Long Beach Harbor Tract, in the City of Long Beach, said County and State, as per map recorded in Book 10 page 142 of Maps, records of said County:

An undivided one-fourth interest in Lot 14 in Block 7, and entire interest in Lot 5 in Block 20.

XIV. Selvas de Verdugo, in the City of Glendale, said County and State, as per map recorded in Book 37, pages 77 to 83 inclusive, of Maps, records of said County:

(A) Lot 1 in Block 3;
Lot 12 in Block 5;
Lot 1 in Block 6; [134]
the East 20 feet of Lot 23 in Block 11 (measured at right angles to East line of said Lot 23);

Lot ----- 28 in Block 11;
Lots 1 and 4 in Block 18;
Lot 7 in Block 20;
Lot 20 in Block 25 @ Book 44 page 64 of Maps, and
Lots 1 and 21 in Block 26 @ Book 44 page 64 of Maps;
Excepting all water in or under said land.

(B) Selvas de Verdugo, in said City; County and State, as per map recorded in Book 46 pages 23 and 24 of Maps, records of said County;
Lots 1 and 2 in Block 27;
Excepting all waters in or under said land.

(C) Lots 1 and 15 in Block 29 of said Tract;
Lots 1, 2, 3, 7 and 8 in Block 30;

- (D) A portion of Lot 8 in Block 31, described as follows:

The triangular lot commencing South $53^{\circ} 24'$ East 11.44 feet from the Northeast corner of Lot 13, Block 33, Selvas de Verdugo, in said City, County and State, as per map recorded in Book 54 page 88; thence North $7^{\circ} 34'$ East 45.75 feet; thence South $53^{\circ} 24'$ East 22.2 feet; thence South $36^{\circ} 36'$ West 40 feet to the beginning.

Excepting all waters in or under said land.

- (E) Lot 4 in Block 32 of said Tract, as per map recorded in Book 54 pages 88 and 89 of Maps, and

- (F) Also all that part of Lot 8 in Block 31 of said Tract as per map recorded in Book 46 pages 23 and 24 of Maps, adjoining Lot 4 lying West of the Southerly prolongation of the East line of said Lot 4;

Excepting all waters in or under said land.

- (G) Lot 8 in Block 32 of said Tract, as per map recorded in Book 54 pages 88 and 89 of Maps; Except that portion deeded to the Southern California Edison Company for right of way purposes.

- (H) Lots 3, 4, 6 and 16 in Block 34 of said Tract, as per map recorded in Book 54 pages 88 and 89 of Maps;

Except that portion of Lots 3, 4 and 16 deeded to the Southern California Edison Company for right of way purposes.

Note: Lot 6 in Block 34 is an improved Lot.
Excepting all waters in or under said land.

(I) Lots 1, 2, 4 and 6 in Block 36 of said Tract as per map recorded in Book 54 pages 88 and 89 of Maps, and Lots 1 and 3 in Block 38 of said Tract as per map recorded in Book 54 pages 88 and 89 of Maps. [135]

Excepting all water in or under said land.

(J) Lots 4, 8, 26, 28, 31, 32, 34 and 35 in Block 39; Lots 1, 23, 27, 28, 29 and 32, except the Westerly 5 feet of Lot 32, in Block 40; Lots 1, 2, 3, 4, 8, 9, 12, 13, 14, 16, 21, 22, 25, 31, 33 and 37 in Block 41;

Lots 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 18, 19, 21 and 22 in Block 42; and

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 19, 20 and 21 in Block 43. of said Tract, as per map recorded in Book 84 pages 99 and 100 of Maps, records of said County.

Excepting all waters in or under said land.

Excepting Also from Lots 1 and 2 in Block 41; Lots 3, 4, 6, 7, 8, 18, 19, 21 and 22 in Block 42; and

Lots 16, 17, 19, 20 and 21, in Block 43 the 150 foot strip of land conveyed to Southern California Edison Company, by deed recorded in Book 4602 page 238 of Official Records.

XV. That portion of the 3365.95 acre allotment of Maria Delores Domingues de Watson in the Rancho San Pedro, in the City of Los Angeles, said County and State, described as follows:

Beginning at the intersection of the Northerly line of Grant Avenue (formerly Watson Alley) with the Northerly prolongation of the West line of Block 10 Domingues Harbor Tract, as per map

recorded in Book 12 pages 14 and 15 of Maps; thence Southerly along the prolongation and West line of said Block 10 to the North line of the 50 foot right of way of the Southern Pacific Railroad; thence Northwesterly along said North line to the West prolongation of said North line of Grant Avenue; thence Easterly along said prolongation to the point of beginning;

Except that portion thereof, if any, included in drainage channel of Nigger Slough.

Note: Said property is a triangular parcel at Northeast corner of Tract No. 2016 and is a part of Lot 6 of said allotment. (For property in Tract No. 2016 see paragraph IV page 4-b hereof.) [136]

Group or Parcel 2: — Acreage Property

I-a Tract No. 250, in the County of Los Angeles, State of California, as per map recorded in Book 15 pages 130 and 131 of Maps, records of said County:

- A. Lots 179-1/2 and 180-1/2;
- B. Lot 181-1/2, and
that portion of Laurita Place vacated, adjacent to Lot 181-1/2;
- C. Lots 184, 185, 186, 188, 189, 190 and 192;
- D. South half of Colina Drive vacated, adjacent to Lots 190 and 192;
- E. Lot 191 and South and Westerly one-half of the vacated portion of Colina Drive adjacent, except those portions thereof included within the lines of the following described parcel:

Beginning at the Northwest corner of Lot 13 of said Tract; thence along the prolongation of the North line of said Lot 13, South 88° 36' West 52.98 feet; thence South 39° 07' East 64.08 feet to the beginning of a curve concave to the Southwest having a radius of 285.47 feet; thence Southeasterly along said curve 49.49 feet to an angle point in the Westerly line of said Lot 13 distant North 29° 11' West 54.21 feet from the Southwest corner of said Lot 13; thence Northerly along the Westerly line of said Lot 13, 93.79 feet to the point of beginning.

- F. Lots 193, 194, 195, 205 and
- G. Lot 204 of said Tract in the City of Glendale.
Except that portion described as follows:

Beginning at a point in the Northerly line of said Lot 204, 130 feet East from the Northwest corner of said Lot 204, thence South parallel with the Westerly line of said Lot 204, 180 feet; thence East parallel with the Northerly line of said Lot 204 to the Southeasterly line of said Lot; thence Northeasterly along the Southeasterly line of said Lot 204 to the Northeast corner thereof; thence Westerly along the Southerly line of Colina Drive (the Northerly line of Lot 204) to the point of beginning.

Excepting From All of Said Land in Said Tract No. 250 All Water on and Underneath the Same.

- II-a Tract No. 1000, in the City of Los Angeles, said County and State, as per map recorded in Book 19 pages 1 to 34 inclusive, of Maps, records of said County:
Lots 2, 23 and 24; [137]

Excepting the water in and upon said land as owned by the City of Los Angeles;

Also Excepting all mineral, coal, oils, petroleum and kindred substances and natural gas under and in said land.

III-a Tract No. 1335, in the City of Los Angeles, said County and State, as per map recorded in Book 18 page 131 of Maps, records of said County:

Lots 1 and 2;

Excepting the water in and upon said land as owned by the City of Los Angeles;

Also Excepting all mineral, coal, oils, petroleum and kindred substances and natural gas under and in said land.

IV-a Tract No. 1336, in the City of Los Angeles, said County and State, as per map recorded in Book 18 pages 146 and 147 of Maps, records of said County:

Lots 4, 5, 6 and 7;

Excepting the water in and upon said land as owned by the City of Los Angeles;

Also Excepting all mineral, coal, oils, petroleum and kindred substances and natural gas under and in said land.

V-a Rancho Los Cerritos, in the City of Long Beach, said County and State, as per map recorded in Book 4 page 406 et seq. of M.R. of said County:

(A) The West 18 acres of the East 33 acres of Lot 20 of the 1419.09 acre Tract of said Rancho; Excepting that portion thereof conveyed to the Edison Securities Company by deed recorded in

Book 6548 page 184 and described as lying West of the following described line:

Beginning at a point in the center line of Willow Street as now established, along North line of Lot 18 of said 1419.09 acre Tract, distant North $89^{\circ} 40' 15''$ East 116.96 feet measured along said center line from the compromise boundary line between Rancho Los Cerritos and Rancho San Pedro as said line is re-located and shown in Book 13 page 25 Records of Survey; thence from said point of beginning South $0^{\circ} 14' 29''$ East 120 feet; thence South $16^{\circ} 39' 10''$ West 4440.70 feet, more or less, to a point in said compromise line South $6^{\circ} 00'$ West 1679.07 feet from Station 49 in said compromise line, as shown on said Records of Survey;

Also Excepting the South 20 feet thereof, reserved for public road. [138]

(B) That part of Lot 20 of said 1419.09 acre Tract of said Rancho, in said County and State, described as follows:

Beginning at a point in the South line of said Lot, 20 rods West of the Southeast corner thereof, said point being in the center line of Hill Street; thence West 10 rods; thence North at right angles 80 rods; thence East at right angles 10 rods; thence South at right angles 80 rods to the place of beginning;

Except the South 20 feet of said premises included in public road; all as per map recorded in Book 4 page 406 et seq. Miscellaneous Records of said County.

(C) Those portions of Lots 30 and 31 of the 1419.09 acre Tract, commonly known as "Wilmington Colony Tract", of said Rancho, in the City of Long Beach, said County and State, described as follows:

(a) The Westerly half of the Northerly three-fourths of Lot 30;

Except the Northerly 20 feet reserved for public road.

Excepting the Easterly 30 feet thereof, known as Seabright Street.

(b) All of said Lot 31;

Except the Southerly 10 acres thereof.

Also Excepting that portion described as follows:

Commencing at the Northwest corner of said Lot 31, running thence East 5.26 chains in the middle of the San Gabriel River; thence South $10^{\circ} 14'$ West 4.23 chains; thence South $29^{\circ} 13'$ West 3.38 chains; thence South $18^{\circ} 5'$ West 4.25 chains; thence South $4^{\circ} 36'$ West 3.90 chains; thence West 1.17 chains; thence North 15 chains to the point of beginning containing about 4-1/2 acres as conveyed to A. L. Park and S. H. Wheeler by deed recorded in Book 536 page 276 of Deeds; and

Also Excepting the Northerly 20 feet thereof reserved for public road.

VI-a Verdugo Estate, in said County and State, as per map recorded in Book 12 pages 34 and 35 of Maps, records of said County:

Lot 3;

Except those portions described as follows:

Beginning at a point in the Northerly boundary line of said Lot 3 of the Verdugo Estate, which point is distant South $88^{\circ} 37'$ West 43.54 feet along said Northerly boundary from the Easterly terminus of that certain course in said Northerly boundary line shown on said above mentioned map as having a bearing of North $88^{\circ} 37'$ East and a length of 19.185 chains; thence from said point of beginning, North $88^{\circ} 37'$ East 43.54 feet along the Northerly boundary line of said Lot 3 to an angle point; thence South $62^{\circ} 15'$ East 877.50 feet along the North-easterly boundary line of said Lot to the most Easterly corner of said Lot 3; thence along the Easterly boundary line of said lot the following five courses and distances: South $30^{\circ} 54' 20''$ West 427.9 feet; South $6^{\circ} 3' 40''$ West 901.96 feet; South $56^{\circ} 32' 25''$ West 200.49 feet; South $0^{\circ} 57' 50''$ West 264.60 feet, and South $29^{\circ} 24'$ West 135.36 feet; thence North $0^{\circ} 02' 55''$ West 2023.95 feet, more or less, to the point of beginning.

Also Excepting a strip of land 150 feet in width across said Lot 3 as conveyed to Southern California Edison Company, by deed recorded in Book 4602 page 238, Official Records. [139]

VII-a Selvas de Verdugo, in the City of Glendale, said County and State, as per map recorded in Book 37 pages 77 to 83 inclusive, of Maps, records of said County:

(A) Lot 1 in Block 23;

Except that portion thereof described as follows:

All that portion of said Lot 1 included within the lines of Lot 108 of Tract No. 250 as per map recorded in Book 15 pages 130 and 131 of said Map records.

Excepting all waters in or under said land.

- (B) Also that portion of Bonita Drive, as shown of said map of Tract No. 250, now vacated, described as follows:

Beginning at the intersection of the Easterly line of said Lot 108 of Tract 250 with the Westerly line of Hermosita Drive, as shown on map of Selvas de Verdugo Tract; thence Northerly along the Easterly line of said Lot 108 to the intersection of said Easterly line with the Southerly line of Lot 2 in Block 23 of said Selvas de Verdugo Tract; thence Easterly along the Southerly line of said Lot 2 to a point in the Westerly line of said Hermosita Drive; thence Southerly along said Westerly line of Hermosita Drive, being also the Easterly line of said Lot 1 to the point of beginning.

Excepting all waters in or under said land.

- (C) Selvas de Verdugo, in said City, County and State; as per map recorded in Book 37 pages 77 to 83 inclusive of Maps, records of said County: Block 22;

Except that portion deeded to the City of Glendale for street purposes to be known as Hillside Drive by deed recorded in Book 5637 page 320, Official Records.

Excepting all waters in or under said land.

- (D) Selvas de Verdugo, in said City, County and State, as per map recorded in Book 37 pages 77

to 83 inclusive of Maps, records of said County:

Block 24;

Excepting all waters in or under said land.

VIII-a Teodora and Catalina Verdugo Allotment of Rancho San Rafael, in said County and State, as per map recorded in Book 75 pages 61 and 62 of Maps;

2.20 acres, being a portion of 47.95 acres of said allotment, described as follows:

Commencing at the intersection of the East line of Verdugo Road with the North line of said 47.95 acre tract; thence South on said East line of Verdugo Road to South line of said Tract; thence North $85^{\circ} 37'$ East 144.75 feet; thence North $37^{\circ} 40'$ East 4.30 chains; thence North $21^{\circ} 29'$ East 1.81 chains; thence North $82^{\circ} 15'$ West to point of beginning. [140]

IX. Rancho San Rafael, in the City of Glendale, said County and State;

That portion of 2629.01 acre tract allotted to Teodora and Maria Catalina Verdugo by decree in partition in Case 1621., District Court in said County, entitled A. B. Chapman et al vs. Fernando Sepulveda, described as follows:

Beginning at a stake in the Westerly line of said allotment, 100.64 chains South from Station 22 of the exterior line of said allotment being the Southwest corner of the 132.07 acre tract of land formerly owned by Marie le Mesnager; thence South $85^{\circ} 41'$ 53.10 chains; thence North $9'' 48'$ East 16.50 chains; thence North $85^{\circ} 37'$ East 4.84 chains; thence North $41^{\circ} 51'$ East 4.10 chains; thence North $21^{\circ} 29'$ East 1.81 chains;

thence North $82^{\circ} 15'$ West 6 chains 50 links to a point North $10^{\circ} 38'$ East 6.42 chains from the North end of the second call on this description, to-wit: Being the call "North $9^{\circ} 48'$ East 16.50 chains, thence South $59^{\circ} 30'$ West 1.75 chains; thence South $10^{\circ} 33'$ West 6.40 chains"; thence Southwesterly in a straight line to the Southwest corner of said 132.07 acre tract, to the point of beginning.

Except that portion of the above described land lying between Hermosita Drive, as shown on the map of Selvas de Verdugo, Sheets 11 and 12, recorded in Book 54 pages 88 and 89 of Maps, in the office of the County Recorder of said County, and Verdugo Canon Road, as said Road is now located and shown on the map of Selvas de Verdugo, Sheets 13 and 14, recorded in Book 84 pages 99 and 100 of said Map Records.

Excepting Also 2.20 acres, being a portion of 47.95 acre tract, being a portion of Teodora and Catalina Verdugo allotment of Rancho San Rafael as per map of record in Miscellaneous Records, Book 75 pages 61 and 62 of Maps, in the office of the Los Angeles County Recorder, commencing at the intersection of the East line of Verdugo Road with the North line of said 47.95 acre tract, thence South on said East line of Verdugo Road to the South line of said tract, thence North $85^{\circ} 37'$ East 144.75 feet, thence North $37^{\circ} 40'$ East 4.30 chains, thence North $21^{\circ} 29'$ East 1.81 chains, thence North $82^{\circ} 15'$ West to point of beginning.

Excepting all water in or under said land. [141]

Group or Parcel 3:

Whereas, by assignment of mortgage executed by F. P. Newport Corporation, Ltd., said corporation assigned, transferred and set over, with power of sale, unto the Security-First National Bank of Los Angeles that certain mortgage dated May 25th, 1928, made and executed by T. L. Dudley, Mortgagor, in favor of F. P. Newport, Mortgagee, and recorded on the 29th day of May, 1928, in Book 8607, page 103 of Official Records, in the office of the County Recorder of Los Angeles County, State of California, together with the note described in said mortgage dated May 25th, 1928, due May 25th, 1931 for Thirty-nine Thousand Three Hundred Seventy-five Dollars (\$39,375.00), and moneys due or to grow due thereon with interest; a verbatim copy of said note is attached hereto, made a part hereof and marked "Exhibit A"; the property covered by said mortgage is described as follows:

Those portions of the Rancho Los Cerritos, in the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 4 page 406 et seq. of Miscellaneous Records, described as follows:

Parcel 1: Beginning at the most Southwesterly corner of the land described in the deed to the Title Insurance and Trust Company, recorded in Book 5577 page 105 of Deeds, Records of said County, in the Northwesterly line of Channel #3, Long Beach Harbor; thence along said Northwesterly line South 64° 42' 30" West 250 feet; thence North 19° 42' 30" East 738.08 feet; thence North 64° 42' 30" East 250 feet to the most Northwesterly corner of the land described in said deed to the Title Insurance and

Trust Company; thence along the Northwesterly line of said land so described, South 19° 42' 30" West 738.08 feet to the point of beginning.

Parcel 2: Beginning at the most Southeasterly corner of the land described in the above mentioned deed to the Title Insurance and Trust Company, in the Northwesterly line of Channel #3 of Long Beach Harbor; thence along the Southeasterly line of the land described in said deed North 19° 42' 30" East 738.08 feet; thence North 64° 42' 30" East 500 feet; thence South 19° 42' 30" West 738.08 feet to a point in said Northwesterly line of Channel #3; thence along said Northwesterly line South 64° 42' 30" West 500 feet to the point of beginning. [142]

Note 1: The above property described in said Parcels 1 and 2 is designated as Lots 18, 20 and 21 on the map made by the City Engineer of the City of Long Beach for local assessment purposes, recorded in Book 1 page 10 of the County Recorder's Assessment Maps, recorded February 9th, 1917.

Note 2: The above property described in said Parcels 1 and 2 is also commonly referred to as "Harbor Frontage Property".

Group or Parcel 4:

Whereas, by assignment of beneficial interest executed by F. P. Newport Corporation, Ltd., said corporation assigned, transferred and set over, with power of sale, unto said Security-First National Bank of Los Angeles its entire beneficial interest (being 57/80ths interest) in and to a Trust evidenced by that certain Declaration of

Trust No. P-1512 issued by the Title Guarantee and Trust Company, a corporation, together with a like interest in and to the proceeds and avails arising or growing out of said transfer or assignment, subject, however, to all of the terms and conditions of said Trust and to all instruments amending or supplementing said Declaration of Trust; a verbatim copy of said beneficial interest is attached hereto, made a part hereof and marked "Exhibit B"—(a copy of said Declaration of Trust being on file with the Trustee hereunder).

Note: The real property covered by said Declaration of Trust is the same property as covered by the above mortgage.

The title to the property described in Groups or Parcels 1 and 2 hereof as shown by the Policy and/or Policies of Title Insurance issued by the Title Insurance and Trust Company under its No. 1178917, to be hereafter procured, shall be vested in the Security First National Bank of Los Angeles, a national banking association, free from all incumbrances except bonds for the improvements of the streets, taxes, and conditions, restrictions and rights of way of record as set out in said Policy and/or Policies, a copy [143] of each Policy shall be hereafter attached hereto, made a part hereof and marked "Exhibit C"; and

The title to the real property covered by the Mortgage and Declaration of Trust referred to at Group and/or Parcel 3 and Group and/or Parcel 4 hereof, as shown by Policy of Title Insurance issued by said Title Company under the above number shall be vested in the Title Guarantee and Trust Company, a corporation, subject to the incumbrances as waived and excepted by the Beneficiary and the Trustee hereunder, and particularly re-

ferred to in said Policy, a copy of which shall be hereafter attached hereto, made a part hereof and marked "Exhibit C-I". [144]

Whereas, the Trustee paid no consideration for the conveyances of said real property, the assignment of said note, mortgage and beneficial interest in said Declaration of Trust, and while said conveyances to the Trustee were in form and by their terms absolute, yet, nevertheless, they were intended to be and were received by the said Trustee herein, in trust, with power of sale, primarily as security for the payment of the note herein set out now owing from the said Beneficiary to the said Payee, together with all interest that may be due or that may accrue on said note or notes, together with any renewal or renewals of said note, and also as security for the payment of any additional sums, with interest thereon, that may be hereafter borrowed and received by the said Beneficiary from the said Payee and evidenced by another promissory note or notes executed and delivered therefor by the said Beneficiary to the said Payee, together with any renewal or renewals of said note or notes and also as security for any sums of money, with interest thereon, that may be expended either by the Trustee or the Payee herein as hereinafter provided, and the conveyances of said real property were further received for the purpose of subdividing, renting, leasing, selling and conveying said property in accordance with the terms and conditions hereinafter set forth; and

Whereas, the Beneficiary shall have the right to make additions of property, or rights of any kind or character, to the corpus of this Trust, at any time, and such additions thereto, when so made, shall ipso facto be impressed with all of the indebtedness secured hereby, and said Trustee

shall have the same power and authority respecting the same as if the same had originally constituted a portion of the corpus of this Trust. Conditioned, However, that said Trustee reserves the right to refuse to accept as a part of the corpus of this Trust, any such additions, and reserves the further right when and if such additions thereto are made, to require amendments of the Declaration of Trust herein as it may deem convenient and/or necessary for the management and administration of this Trust.

Now, Therefore, This Declaration of Trust.

Witnesseseth:

That the Security-First National Bank of Los Angeles as Trustee does hereby certify and declare that it holds and shall hold all interest in the property, both real and personal, conveyed to it through said conveyances in trust, and all other property that may hereafter be conveyed to it as hereinbefore provided, with power of sale, for the purpose of securing the payment of the above described note and the payment of any indebtedness secured hereby; and also for the purpose of collecting and/or enforcing the payment of both the principal and the interest on the mortgage note referred to in Group or Parcel 3 of the property covered hereby; and for the purpose of collecting the proceeds and avails of the Trust referred to in Group or Parcel 4, and also for the purpose of subdividing, renting, leasing, selling and conveying the property referred to in Groups or Parcels 1 and 2 and applying and disposing of the proceeds and avails arising therefrom in accordance with the terms and conditions herein expressed, to-wit:

Article First: During the continuance of these trusts the Beneficiary agrees as follows:

- (a) To pay before delinquency, all taxes, assessments and the installments of principal and interest on any street bonds upon said property and any tax upon any note secured hereby;
- (b) To pay the principal and interest of any note secured hereby in favor of the Payee hereunder, as and when due;
- (c) To pay when due, all other claims, liens and encumbrances affecting, or purporting to affect, the title to said property, and all costs, charges, interest and penalties on account thereof, and also all costs, fees, charges and expenses of the Trustee and of these trusts as herein provided;
- (d) To appear and defend in any action or proceeding at law affecting, or purporting to affect, said property, these trusts, or the rights of either the Trustee or the Payee hereunder; and said Beneficiary hereby agrees to pay all costs and expenses of any such action or proceedings, together with the attorney's fees in a reasonable sum to be fixed by the Court, whether any such action or proceeding progress to judgment or not, and whether brought by or against the Trustee or the Payee;
- (e) To protect, preserve and defend said property and the title thereto, and to keep said property in good condition and repair, and to permit no waste or deterioration thereof; and
- (f) To pay for all improvements contracted for or ordered by the said Beneficiary or its duly authorized Agent.

Said Beneficiary, by its ratification of this Declaration of Trust, promises and agrees to file with the [147] Trustee a copy of each contract let for said improvements, and also a Surety Bond satisfactory to the Trustee for the amount of the improvements as called for in each contract, guaranteeing the installation of said improvements and indemnifying said Trustee and said property against all costs, charges and/or liens imposed upon said property by reason of any improvements placed thereon.

In the event that said Beneficiary fails to so file with the Trustee a bond satisfactory to said Trustee, then and in that event said Trustee will, upon the written instructions of the Payee hereunder, post notices of non-responsibility upon the Trust property and record the same in such manner as will comply with Section 1192 of the Code of Civil Procedure of the State of California, protecting said Trustee and said property against any liens imposed upon said property by reason of the improvements made thereon.

It is understood and agreed that until said Bond shall have been filed with the Trustee said Trustee shall not be required to issue and deed or contract to any lot in the subdivision of the Trust property.

Should the Beneficiary fail or refuse to make any of the payments or to do any of the acts hereinabove mentioned, then the Trustee and/or the Payee, or either of them, may without notice to the Beneficiary, make or do the same in such manner and to such extent as they, or either of them, may elect, and may pay, purchase, contest or compromise any claims, liens or incumbrances which in their judgment appear to affect said property or these trusts, but neither the Trustee nor the Payee shall be obligated to do any of the things above [148] mentioned. Said Beneficiary agrees to repay within thirty (30) days

from the date of advancement, and without demand, all sums advanced or expended by the Trustee or the Payee under the terms hereof, with interest thereon from the date of advancement until repaid, at the rate fixed in said note hereinbefore referred to, and if not so repaid, and/or upon failure of said Beneficiary to perform any and all of the acts agreed to be kept and performed, such act shall constitute a default hereunder and subject the Beneficiary to a sale of its rights hereunder as provided in Article Second herein.

Article Second: Should the Beneficiary default in payment when due of any sum payable on any indebtedness owing to said Security-First National Bank of Los Angeles, or should the Beneficiary default in the prompt performance of any covenant, agreement or undertaking hereof and should such default continue for a period of sixty (60) days after notice thereof in writing has been mailed to the party or parties in default, by registered mail addressed to their last address, on file with the Trustee, the Trustee in addition to any other remedies given it by law or hereunder, may at its option to satisfy in the order of priority herein provided, any and all obligations secured hereby, proceed to foreclose and sell the beneficial right, title and interest of the Beneficiary and of all persons claiming under or through it, in and under this Trust and/or in and to the property included in this Trust, in one or more of the following methods, the Trustee being granted absolute discretion to determine which of said methods it shall follow:

(1) At its election it may sell such beneficial right, title and interest, if any, in and under this Trust at [149] public auction as personal property under pledge in accordance with Sections 3000 to 3011 of the Civil Code of

California and not in accordance with Section 2924 of said Civil Code, or it may make such sale without the demand of performance and notice of sale provided for by Sections 3001 and 3002, respectively, of said Code, said Beneficiary for itself and its successors in interest hereby expressly waiving such statutory demand and notice and the benefits and provisions of each and all of Sections 3000 to 3011 inclusive, and 2924 of the Civil Code of California, in accordance with Section 3268 thereof. To enable the Trustee fully to consummate any such sale and to transfer, assign and deliver the interests of the Beneficiary hereunder to any purchaser upon the sale thereof, the Beneficiary does hereby convey, transfer, assign and deliver to said Trustee all its interests and title in fee to its said beneficial interests under this Trust and in and to the Trust estate, if any, for the purpose of such sale; or

(2) At the Trustee's election it may sell such right, title and interest, if any, of the Beneficiary, or its successors in interest in and under this Trust and/or in and to the property then comprising the Trust estate, after having recorded the Notice of Default provided by Section 2924 of the Civil Code of California, or without such notice and recordation as the Trustee may elect, the provisions and benefits of that Section being also hereby waived by the Beneficiary, and by it for its successors in interest, in accordance with Section 3268 of said Civil Code. Such sale of any right, title or interest in or to the property comprising the Trust estate shall be made only in the manner required by law for the sale of real property under execution; or [150]

(3) At the Trustee's election it may sell, dispose of, or in any manner which it may deem expedient, proceed against and foreclose in any manner permitted by law,

the entire interest of the Beneficiary and those claiming under it in and under this Trust and/or in and to the entire Trust estate then subject to this Trust.

Any sale made in any of the foregoing manners may be postponed by the Trustee from time to time by publication prior to the date originally set, of a notice of postponement in the same newspaper or newspapers in which the original notice of sale was published, if any, or by public announcement thereof at the time and place of sale so advertised or noticed or to which said sale may be postponed.

At the time and place fixed for any sale as above provided the Trustee may sell the entire beneficial right, title and interest of the Beneficiary, or its successors in interest, in and to this Trust and/or in and to the property then included in it to the highest bidder for lawful money of the United States, and upon such sale and payment made it shall execute and deliver to the purchaser or purchasers a transfer and assignment or conveyance evidencing such purchase, whereupon such purchaser shall succeed to the entire right, title and interest of the person or persons whose interest is sold in and under this Trust and/or to their right, title and interest in and to the property then comprising the trust estate as the case may be.

The recitals in any such transfer and assignment or any such conveyance, of facts affecting the regularity and validity of such sale shall be conclusive proof of the truthfulness of such recitals, and such transfer [151] and assignment or conveyance shall be conclusive as to the legality and regularity of all proceedings leading up and prior thereto.

At any such sale either the Trustee, the Payee, the Beneficiary, or any other person may become the purchaser.

The Trustee shall apply the proceeds received by it from any such sale or sales made hereunder to the payment of the amounts and items in the order of priority as follows:

(a) Expenses of sale, including posting and advertising, together with the unpaid costs, fees, charges and expenses of this Trust, and in addition thereto the Trustee's fees for making said sale, which are hereby fixed at the sum of Four Hundred Dollars (\$400.00), plus Fifty Dollars (\$50.00) for each Five Thousand Dollars (\$5,000.00) or fraction thereof that the total amount then unpaid and secured hereby exceeds Fifteen Thousand Dollars (\$15,000.00);

(b) All sums which may have been theretofore paid, loaned or advanced by the Trustee in accordance with the provisions hereof or in the course of its administration and for the benefit of this Trust and not then repaid, including the compensation of the Trustee, other than compensation for making such sale, and any and all other costs and expenses of the Trust with accrued interest, if any, in each case;

(c) The amount due and unpaid on all indebtedness secured hereby, in the priority in which such indebtedness is so secured, as herein provided, with whatever interest that may have accrued thereon, and if the balance of such proceeds is not sufficient to pay said indebtedness in full, pro rata credit shall be given on each note, only for the amount so realized from said sale, and shall in no manner be considered a discharge of such indebtedness, or prevent a recovery thereon of any unpaid balance; and

(d) The balance of said proceeds, if any, to the person or persons legally entitled thereto;

or

(4) Should a breach or default be made in the payment of any note or notes or other obligations for which this Declaration of Trust is a security, and such default or defaults shall continue for a period of thirty (30) days after the time therein mentioned for payment, then the holder or holders of such note or notes, or indebtedness mentioned as [152] secured hereby, may declare all sums secured hereby immediately due and payable, and shall execute and deliver to the Trustee a written Declaration of Default hereunder and demand for sale, and shall thereafter record, in the office of the Recorder of the County wherein said property or some part thereof is situated a notice of such breach or default and of its election to cause the property then comprising the Trust Estate, to be sold to satisfy said obligations.

In any such sale the Trust Estate to be sold shall be the following:

I. All the real property subject to this Declaration of Trust, except:

(a) The real property which has been deeded by the Trustee pursuant to the provisions of this Trust;

(b) Real property which the Trustee has contracted to sell under the provisions of this Trust pursuant to agreements of sale which are then existing and outstanding; and

(c) Property, if any, hereafter subjected to this Declaration of Trust and subject to sale under contracts executed prior to the time such property was subjected to this Trust Agreement which are then existing and outstanding.

II. All right, title and interest of the Beneficiary of this Trust in and to each and all contracts and/or agree-

ments of sale belonging to this Trust and which are then existing and outstanding. The right, title and interest of the Beneficiary of this Trust in and to said contracts, and each thereof, shall include the following: [153]

(a) All right, title and interest of the Beneficiary of this Trust in and to the real property covered by said contracts, including all reversionary rights to said property;

(b) All the rights and benefits of the Beneficiary of this Trust pursuant to and to the extent of the interest of the Beneficiary in said agreements of sale, including the right to enforce the trusts created hereunder; and

(c) The right to all moneys thereafter collected by the Trustee upon said contracts then outstanding and existing, less subsequent fees and advances of the Trustee, and commissions, if any, due or to become due to sales agents.

III. The right to obtain from the Trustee holding title to the property covered by any of said contracts a full conveyance of the title to such property in the event of the forfeiture, termination and cancellation of such contract.

IV. All notes, together with the mortgages or deeds of trust securing such notes, and other securities which the Trustee shall have received by virtue of these presents.

After three (3) months shall have elapsed following said recordation of said notice, the Trustee, without demand on the Beneficiary or any other person, shall sell said property at such time and place, and shall sell the real property so to be sold in such parcels, as it shall deem best to accomplish the objects of these Trusts, having first given notice of the time and place of such sale or sales in the manner and for a time not less than that

required by law for sales of real property upon execution, and by posting a copy of such notice in some conspicuous place on the property to be sold [154] at least twenty (20) days before the date of sale.

The Trustee may postpone sale of all, or any portion of said property by public announcement at the time fixed by said notice of sale, and may thereafter postpone said sale from time to time by public announcement at the time fixed by the preceding postponement; and without further notice it may make such sale at the time to which the same shall be so postponed, provided, however, that the sale or any postponement thereof must be made at the place fixed by the original notice of sale, and provided that the sale held pursuant to such postponement or postponements shall be held within twelve months from the date originally set for such sale.

Such sale or sales shall be made in the following manner, namely:

At the time and place of sale fixed as hereinbefore provided, the Trustee may sell the property so advertised, or any portion thereof, either en masse, or the real property to be sold in separate parcels, or the right, title and interest of the Beneficiary in one or more of said agreements of sale separately, or any part of said securities separately, at its sole discretion, at public auction, to the highest bidder for cash in Lawful Money of the United States, all payable at time of sale, and, after any such sale and due payment made, shall execute and deliver to the purchaser or purchasers a deed or deeds, and/or other instruments of transfer, conveying the property so sold to such purchaser or purchasers, and shall assign the right, title and interest of the Beneficiary so sold in and to said agreements of sale, retaining the title to the real property covered by such agreements of sale for the bene-

fit of the purchaser at the sale, and shall assign [155] any securities so sold to the purchaser thereof. Said sale, and the deeds, assignments or other instruments evidencing the same, shall be without covenant or warranty, express or implied, regarding the title, possession or encumbrances.

The right, title and interest of the Beneficiary, which shall be so sold, in and to said agreements of sale, shall include all the right, title and interest of the Beneficiary in and to the real property covered by such agreements of sale, all the rights and benefits of the Beneficiary under this Trust pursuant to and to the extent of the interest of the Beneficiary in said agreements of sale (including the right to all moneys collected by the Trustee after said sale upon said agreements of sale, less unpaid commissions due the Agent and the advances, fees, costs and expenses of the Trustee), and the right of the purchaser at the sale to obtain from the Trustee a conveyance of the title to the property covered by such of said agreements of sale as shall be forfeited, terminated or cancelled. The purchaser or purchasers of the real property sold shall be let without demand into immediate possession of said property, and all other persons in possession thereof shall be deemed to be tenants at sufferance.

The recitals in any such deed, assignment or other instrument, of any facts or matters affecting the regularity or validity of such sale shall be conclusive proof of the truthfulness of such recitals, and shall be conclusive against all persons as to all matters recited therein. The Trustee, or the Payee, or any person on behalf of either, or any other person, may purchase at such sale.

In the event that the part of the Trust estate described in Subdivision II of this sub-article (4) is not sold [156] in one parcel as an entirety but is sold in several parcels

to more than one purchaser, each of the purchasers respectively at such sale shall acquire all of the rights enumerated in Subdivision II of this Article, only insofar as said rights apply to or arise out of the respective contracts, the right, title and interest to which such purchaser shall have purchased.

It is specifically understood and agreed that from and after any such sale the Trustee shall retain the legal title which such Trustee holds to all the real property covered by contracts of sale of land which the Trustee has entered into, and contracts of sale affecting property hereafter subjected to the terms of this trust agreement which are then outstanding and existing, so as to enable the Trustee hereunder to carry out all of such contracts and to administer the trusts and perform the duties in relation to such contracts as set out in this Declaration of Trust.

After such sale whenever payment in full of any said contracts for the sale of the land shall have been made by the contract holders and such contract fully complied with according to its terms, said Trustee shall convey such land to such contract holder or to the person entitled thereto and to that end shall execute a deed or conveyance in such form as may be called for in such contract and deliver the same to such contract holder or the person entitled thereto without any liability, except for the accounting of the moneys collected on such contract.

In the event the terms of any said contracts for sale of the land are not complied with the Trustee shall continue to hold title to such lot or lots until all rights of the contract holder, or assignee thereof, have been forfeited, terminated and cancelled, and said Trustee fully released from [157] all liability under such contract in a manner satisfactory to said Trustee. Upon such forfeiture,

termination and cancellation said Trustee shall hold for the benefit of, or convey title to such lot or lots to the purchaser or purchasers of the Trust estate according to the election of such purchaser, subject to the payment of reasonable fees of the Trustee.

The Trustee shall apply the proceeds received by it from any such sale or sale made hereunder to the payment of the amounts and items in the order or priority as follows:

1st: The expenses of such sale (including cost of search or evidence of title), together with all costs, fees, charges and expenses of the Trustee and of these trusts, including Trustee's fees in connection with such sale whether completed or not, which said amounts are hereby fixed at the sum of Four Hundred Dollars (\$400.00), plus Fifty Dollars (\$50.00) for each Five Thousand Dollars (\$5,000.00) or fraction thereof that the total amount then unpaid and secured hereby exceeds Fifteen Thousand Dollars (\$15,000.00);

2nd: All sums due and unpaid to the Trustee, and all sums which may have been paid under or in accordance with the provisions of this Declaration of Trust by the said Trustee or the said Payee, and not repaid, whether paid on account of taxes, assessments, liens or in the performance of the trusts herein created, together with whatever interest that may have accrued thereon;

3rd: The amount due and unpaid on all indebtedness secured hereby, in the priority in which such indebtedness is so secured, as herein provided, with whatever interest that may have accrued thereon, and if the balance of such proceeds is not sufficient to pay

said indebtedness in full, pro rata credit shall be given on each note, only for the amount so realized from said sale, and shall in no manner be considered a discharge of such indebtedness, or prevent a recovery thereon of any unpaid balance; and

4th: The balance of said proceeds, if any, to the person or persons legally entitled thereto.

Article Third: The Trustee shall, subject to the approval of the Payee and the Beneficiary, divide and subdivide said acreage in such tracts, lots or parcels as [158] the Beneficiary may determine and shall have the power to and shall at the Beneficiary's request execute the necessary map or maps of such subdivision from time to time, and in that connection the Trustee is authorized to and shall dedicate and grant to public use any and all roads, streets and alleys shown on such map or maps and is authorized to and shall convey and grant any and all easements and any and all rights of way which may be required or desirable for the transmission of water, gas, electricity or other purposes which may be considered by the Beneficiary to be necessary, desirable or proper for the subdivision and sale of said premises, in whole or in part, or for the best advantages of this Trust or any person who may be interested in it, but all at the cost and expense of the Beneficiary hereunder.

The Trustee shall, subject to the approval of the Payee and the Beneficiary, also have the power to grant to public use or to public or quasi public bodies or corporations, or to private persons, portions of the property for parks, public buildings, schools or other public or quasi public purposes, or to sell one or more lots or parcels at less than the schedule of minimum sales prices hereinafter mentioned, whenever and as often as such course may seem desirable to the said Trustee, Payee and Beneficiary.

Article Fourth: The Beneficiary shall file with the Trustee a schedule of minimum sales prices which shall, when agreed upon by the Trustee and Payee become a part hereof, as fully as though attached hereto at the time of the execution of this Declaration, and said Beneficiary shall from time to time if, when and as portions of acreage are subdivided file with the Trustee a schedule of minimum [159] sales prices of each lot in each such subdivision, which shall, when agreed upon by the Trustee and the Payee become a part hereof.

Except as otherwise expressly herein provided, no lot or parcel shall be sold at any time prior to the payment in full of all indebtedness to the Payee secured hereby at a price less than the minimum sales price set forth in said schedule.

The Payee has fixed a release price for each lot or parcel of the Trust property, except said Group or Parcel 3, which schedule of release prices is attached hereto and marked "Exhibit D". The Payee further agrees, upon the request of the Beneficiary, to fix release prices on the lots of any future subdivision or re-subdivision of the Trust property by allocating an amount satisfactory to it of the releases theretofore fixed for the parcel so re-subdivided and the release prices of the lots as subdivided when agreed upon by the Trustee and the Payee shall be deemed thereupon to become a part hereof for the purposes herein stated as though attached hereto at the time of the execution of this Declaration.

Article Fifth: The Trustee shall rent, lease, sell or convey said property, or any portion thereof, to such person or persons, at such prices and upon such terms and conditions as the Beneficiary hereunder may direct in writing, or upon the written instructions of the duly au-

thorized Agent of the said Beneficiary, subject, however, to the terms of this indenture, and, in the case of leases and rentals, subject to the approval of the Trustee.

Such sales may be made for cash, in which event a discount of five (5) per cent from said minimum sales price may be allowed upon the written request of the Beneficiary, or such [160] sales may be made upon credit evidenced by a written contract of sale in such form and upon such terms as the Trustee and the Beneficiary may determine; or the Trustee shall upon the direction of the Beneficiary when as much as thirty-five per cent (35%) has been paid on the purchase price of any lot execute a deed to the purchaser for said lot upon receiving the purchaser's note for the balance of the purchase price secured by a trust deed constituting a first lien on such lot, and in case of default the Trustee shall have full power to foreclose any such deeds of trust.

Likewise at any time upon the written request of the Beneficiary not more than twenty per cent (20%) building discount may be allowed to any purchaser who shall forthwith upon the purchase of such lot proceed to construct a building thereon in accordance with the restrictions applicable thereto.

In case of sales of lots on credit, not less than fifteen per cent (15%) of the total sales price shall be required as a first or down payment and the balance shall be payable in installments aggregating not less than twenty-four per cent (24%) per annum of the total sales price in each such case which may include interest at seven per cent (7%) or not at the option of the Beneficiary, said terms may be reduced with the consent of the Payee. This paragraph shall not, however, apply to sales of the acreage.

Article Sixth: It is understood and agreed that the Trustee shall issue no deed or conveyance (except sales made as hereinbefore provided by the taking of a note secured by a trust deed) to any portion of the Trust property, nor shall the Trustee reconvey any trust deed held by it hereunder until the said Trustee has credited to the Payee hereunder the [161] amount necessary to release the property so conveyed from the lien in favor of said Payee as is shown on the schedule of release prices in Exhibit "D" attached hereto, and when said release prices have been credited to the Payee then all right, title and interest of the Payee in and to said property shall cease and determine insofar as this Trust is concerned.

Upon the payment to it by the Beneficiary of the release price applicable thereto, the Trustee shall forthwith credit the Payee with such release price, and at the same time execute, acknowledge and deliver to the Beneficiary a reconveyance of any one or more of the parcels of acreage comprising said Group or Parcel 2, anything in this Declaration of Trust to the contrary notwithstanding. In no event, however, shall the Trustee be required to convey any greater title to any of the said property than was received by it under this Trust.

Article Seventh: It Is Understood and agreed that the property covered hereby shall be sold for cash or on terms, and if sold on terms, it may be optional with the Beneficiary to have the purchaser execute an agreement of sale for the balance of the purchase price, or instruct the Trustee to give a deed to the purchaser and the purchaser in turn execute a note in favor of the Security-First National Bank of Los Angeles secured by a purchase money Trust Deed for the balance of the

purchase price; provided the initial payment of thirty-five per cent (35%) of the selling price shall have been paid in cash and the note secured by the trust deed payable in installments at least equivalent to those provided for in Article Fifth hereof for the lots, parcels or acreage sold on terms. [162]

Article Eighth: The purchaser of each lot or parcel sold hereunder from January 1st to June 30th of any year shall pay all taxes for the calendar year in which the property was sold and thereafter. The purchaser of each lot or parcel sold from July 1st to December 31st of any year, shall pay the second half of taxes for the calendar year in which the property was sold and thereafter. All taxes for the fiscal year 1930-31 shall be pro rated by the said Beneficiary.

Article Ninth: The Trustee shall execute all agreements of sale, deeds and other instruments in writing, whatsoever requisite and necessary for the renting, leasing, transferring or conveying of said property or any portion thereof. Such agreements of sale and deeds shall be subject to conditions, restrictions, reservations and rights of way of record, if any, and shall also contain conditions and restrictions as shall be directed by the said Beneficiary and shall be subject to any and all ordinances of any city in which the property is located, or by any governmental or public agency creating or dealing with zones and prescribing the classes of buildings, structures and improvements in said zones and the use thereof.

The Trustee shall be under no liability or responsibility to the Beneficiary hereunder, nor to any other person, for the validity of any condition or restriction inserted in any agreement of sale or deed, nor shall the Trustee be called

upon to defend any suit, proceeding or action at law or in equity, to enforce the performance of, or enjoin the breach of, any such condition, restriction or ordinance, although the said Trustee may defend or prosecute [163] such action at its election upon the request of the said Beneficiary, or any other person, and upon being indemnified for its costs and expenses in any such suit or suits.

Article Tenth: The said Trustee shall not be required to attend to or procure any insurance upon any building upon said property, or to collect or disburse any rents thereof, so long as this Trust shall continue, but all such services shall be performed and the expenses thereof borne by the said Beneficiary, or its representatives.

Article Eleventh: During the continuance of these Trusts, the Trustee is authorized to pay: taxes levied and assessed against said property; any special assessment levied against said property, or any portion thereof, of which the Trustee shall receive due notice; and any other liens or charges against said property necessary for the preservation or maintenance thereof, but all of the above mentioned payments shall be at the expense of the Beneficiary hereunder, and the said Beneficiary, by its ratification of this Declaration of Trust, covenants and agrees to pay to the said Trustee sufficient moneys with which to pay the same before the same becomes delinquent.

Article Twelfth: The Trustee reserves unto itself the right, and shall have the power, solely within its discretion for the benefit of the Beneficiary hereunder, to replace, renew or extend any debt or incumbrance upon the Trust property, or any part thereof, when the same becomes due or at any time such replacement, renewal or

extension may be, in the judgment of said Trustee, for the best interests of this Trust or necessary to protect the Trust property; and upon such terms and upon such conditions and by such means of [164] security as said Trustee may deem proper, including the right and power to convey the fee title to said property, or any part thereof, to such person or corporation as it shall select for the purpose of executing and delivering the necessary note, mortgage, deed of trust, or other hypothecation, to evidence and secure such debt or debts and of reconveying said property to said Trustee subject thereto, and when such reconveyance shall have been so made, said Trustee shall thereupon be restored to its full estate hereunder.

It being distinctly understood that any such conveyance by said Trustee, for the purposes hereinabove stated, shall in no wise be construed as a suspension or termination of this Trust or as in any way impairing, changing or limiting the powers of the said Trustee, as herein expressed and intended. But the powers conferred by this Article shall not be exercised by the Trustee unless the Payee shall have been paid in full, except with its written consent.

Article Thirteenth: It Is Understood and Agreed by and between the parties hereto that the Trustee shall not be obligated to convey to the said Beneficiary, nor to any other person, any land covered by any existing agreement of sale, so long as such agreement is in force and effect, but shall be and is hereby authorized to retain the title to all of said land covered by such agreement until said agreement has been paid in full by the holder thereof, and the land shall then be deeded to the holder of said agreement in accordance with the terms thereof; nor shall the Trustee be obligated to convey, upon the order of the

Beneficiary hereunder, or upon the order of any party to this Trust, any property upon which an agreement to convey has been cancelled, until such time as a cancellation thereof has been effected in form satisfactory [165] to the said Trustee.

It is understood and agreed, however, that the Trustee, upon being indemnified by the Beneficiary for its costs, fees and expenses, shall, upon request of the said Beneficiary, take such legal action as may be necessary for the enforcement of the terms of any of the agreements then outstanding and in default, or take such legal action as may be necessary to obtain a Court Decree quieting its title or obtain such other acquittance as is satisfactory to the Trustee, to any portion of the Trust property upon which an agreement of sale has been, or is to be, forfeited, provided that the purchaser's unrecorded copy of such agreement has not been surrendered to the Trustee for cancellation, but all at the cost and expense of the said Beneficiary.

Article Fourteenth: It Is Understood and Agreed if said Beneficiary or its Agent or Agents shall represent, promise or guarantee to the purchaser or purchasers of the property covered hereby, that improvements shall be made upon said property at the expense of the Beneficiary hereunder, and said Beneficiary shall fail to put in and pay for any improvements so represented, promised or guaranteed, the Trustee hereunder shall have the authority, and is hereby given the express authority, to contract for and to have installed upon said property, at the expense of the Beneficiary hereunder, all or any of the improvements so represented, promised and/or guaranteed.

And said Trustee is hereby given the further authority and right to impound sufficient funds out of the moneys coming to the Beneficiary under this Trust, to pay for any or all of the improvements so represented, promised or guaranteed either by said Beneficiary or its Agent or Agents, [166] and/or ordered by the Trustee on behalf of said Beneficiary by reason of said Beneficiary failing to comply with any of the promises or representations so made.

The Beneficiary agrees to have filed with the said Trustee specifications covering the improvements so represented, promised or guaranteed, and should the Beneficiary fail so to do, the Trustee is hereby given the further authority to contract and pay for the improvements which in its sole discretion shall appear to said Trustee to meet the promises of the Beneficiary or its Agent or Agents, as set forth in the printed matter of the Beneficiary or its Agent or Agents, (copies of all such printed matter shall also be filed with the Trustee) or from evidence presented to the Trustee by purchasers of said Trust property.

Article Fifteenth: The Beneficiary may appoint an Agent or Agents at any time, and from time to time (with full power to revoke any such agency in its sole discretion) to render such services as the Beneficiary may deem advisable in connection with the sale of the Trust property, but any such Agent or Agents must be satisfactory to the Trustee hereunder, and each such Agency Appointment shall be in such form and shall contain such conditions and limitations as shall be satisfactory to the said Trustee. Said Trustee shall, however, in no event be liable to any person for any act, omission, default, defalcation or wrongdoing of any such Agent. [167]

Article Sixteenth: All proceeds and avails arising from the rents, issues, leases and sales of the Trust property, or otherwise, shall be paid to and received by the said Trustee, and said Trustee shall disburse all such proceeds and avails as follows:

I. As to sales made for cash the Trustee shall credit:

(a) To a "Release Fund" the amount necessary to release the lot, parcel or acreage so conveyed by the Trustee from the lien in favor of the Payee hereunder;

(b) To a "Commission and Expense Fund" the amount necessary to pay the commission and/or expenses owing any Agent or the Beneficiary for consummating such sale; and

(c) The balance to a "General Fund".

II. As to sales made for other than all cash the Trustee shall credit:

(a) To the Commission and Expense Fund all of the principal up to thirty-five per cent (35%) of the sales price first received by it from the sale of each lot, parcel or acreage.

Thereafter all of the principal so received shall be credited:

(b) Fifty per cent (50%) thereof to the Release Fund, or so much more as may be required in the sole judgment of the Trustee to pay the release price of the lot, parcel or acreage so sold, and

(c) The balance to the General Fund.

III. All proceeds and avails arising from the leases and rentals of said property so received by the said Trustee shall be credited to the General Fund. [168]

IV. All interest on agreements of sale and notes shall be credited to an "Interest Fund" out of which the Trus-

tee shall pay the interest, when due, upon the note in favor of the Payee hereunder.

Should the moneys in the hands of the Trustee available for that purpose be insufficient to pay said interest when due, and/or should the moneys in the General Fund be insufficient to supply any deficiency in said interest to said Interest Fund, then the Beneficiary by its ratification of this Declaration of Trust, covenants and agrees to pay any deficiency in the amount due on such interest to the Trustee for the benefit of the Payee hereunder.

Any overplus of interest shall be credited quarterly to the General Fund.

V. All moneys credited to the Commission and Expense Fund after deducting the Trustee's costs, fees and expenses (unless they are paid otherwise) shall be disbursed by the said Trustee upon the written instructions of the Beneficiary hereunder.

It is understood and agreed that the sale of each lot, parcel or acreage shall be considered separately and the receipts from the sale of that lot, parcel or acreage shall be used to pay commissions solely thereon. In case of a default in the payment of any agreement of sale or trust deed note before the full payment of commission due on said sale, pending such default, there will be no further commission paid on the balance due on said commission; and in the event any agreement of sale is cancelled by reason of default or non-payment, such cancellation shall automatically cancel the balance of commission due on the property covered [169] by said agreement of sale; and in the event that sales proceedings are held under any trust deed and it transpires that the Trustee becomes repossessed of any of the property at such trust deed sale, such sale shall automatically cancel the balance of commission due on the property covered by said trust

deed. If at such sale any person other than the said Trustee pays the full remaining purchase price plus interest and expenses of sale, then, in that event, the balance of the commission due on any such lot, parcel or acreage shall be paid from the proceeds of such sale.

VI. All moneys credited to the Release Fund shall be applied monthly upon the principal of the note secured hereby in favor of the Payee, interest to cease from the date of applications thereto, said moneys shall be disbursed monthly in multiples of One Hundred Dollars (\$100.00) with a minimum application of Five Hundred Dollars (\$500.00) to the Payee, its legal representatives or assigns.

VII. Out of the moneys credited to the General Fund the Trustee shall pay:

1st: Its accrued costs, fees and expenses as herein-after determined, unless they be sooner paid;

2nd: The taxes, assessments and installments of principal and interest on street bonds assessed or imposed on or against said property then due and unpaid, not payable by the purchaser thereof from the said Trustee.

Should the moneys in the hands of the Trustee available for that purpose be insufficient to pay said taxes and assessments, and installments of the principal and interest on the street bonds when due, then the Beneficiary by its ratification of this Declaration of Trust, covenants and agrees to immediately pay any deficiency in the amount due on said taxes, assessments and bonds to the Trustee. [170]

3rd: Any improvements upon the Trust property, upon the order of the Beneficiary hereunder, or its duly authorized Agent, and/or as contracted for by the Trustee as provided for in Article Fourteenth hereof;

4th: Interest, as and when due, on any note secured hereby, if there are not sufficient moneys in the Interest Fund with which to pay the same;

5th: Any liens or incumbrances covering the property sold, not payable by the purchaser thereof from the said Trustee;

6th: Principal upon any note secured hereby in favor of the Payee after the due date thereof; and

7th: Subject to the foregoing provisions, and provided the Beneficiary is not in default in any manner under the terms of this Declaration of Trust, all of the balance of the moneys received by the said Trustee shall be applied, disbursed and paid in convenient monthly installments to

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the Beneficiary hereunder, its legal representatives or assigns.

The Trustee does not, either as Trustee or in any other capacity, assume or guarantee the payment of the indebtedness secured hereby, or any part thereof, nor does it guarantee the performance, in whole or in part, of any agreement of sale made hereunder by the purchaser thereunder.

It is further understood that the provisions of this Article relating to the payments to be made by the Trustee shall not be construed so as to impose any obligation upon the said Trustee, unless there shall be, at the time such payments become due, sufficient moneys in the hands of the Trustee belonging to this Trust to enable it to make such payments. [171]

Article Seventeenth: It Is Understood and Agreed that the costs, fees and expenses of the Trustee hereunder are as follows:

Section 1:

The sum of one-tenth (1/10th) of one per cent (1%) of the total sales price of the property described in Group or Parcel 1, and one-twentieth (1/20th) of one per cent (1%) of the total sales price of the property described as Groups or Parcels 2, 3 and 4, with a minimum of One Thousand Dollars (\$1,000.00) for the drawing, execution and acceptance of this Trust, provided, however, that the Trustee shall be entitled to, as part of its acceptance fee, the sum of One Dollar (\$1.00) per lot or parcel in each subdivision of the Trust property, with a minimum as above.

Section 2:

As to the lots hereinbefore described as Group or Parcel 1, which lots are now in subdivision forms, as follows:

(a) The sum of Two and 50/100ths Dollars (\$2.50) for each deed, agreement of sale (in duplicate) or other instrument in writing, drawn or executed by the Trustee in the administration of this Trust covering one lot or parcel only, and One Dollar (\$1.00) for each additional lot or parcel covered by said deed, agreement of sale and other instrument;

(b) Collection fees as follows:

The sum of two per cent (2%) of the sales price on sales made for all cash;

The sum of five per cent (5%) of the sales price, and interest, on sales made on terms if monthly payments are less than \$15.00;

The sum of three per cent (3%) on all other collections. If the sales price is \$5,000.00 or over per lot, parcel or acre, special rates will apply. [172]

- (c) The sum of Ten Dollars (\$10.00) for the cancellation of any agreement of sale not including attorney's fees;
- (d) The minimum fee of \$10.00 for the transfer of ordinary assignments of beneficial interest;
- (e) The minimum fee of Twenty-five Dollars for assignments of beneficial interest through court orders;
- (f) The charge of Five Dollars (\$5.00) per deed for placing the deed in escrow with a demand for the balance of the purchase price;
- (g) The minimum charge of Ten Dollars (\$10.00) for each half day for appearance by the Trustee as a witness in Court;
- (h) The Title Company's charge for individual guarantees of title or policies of title insurance, the Title Company's charge for the showing of title to the Trust property vested in the said Trustee, recording expenses, including the Recorder's charge for the recording of the deed to the Trust property, escrow expenses, the cost of printing forms of agreements of sale and deeds, and any other expenses necessary to consummate the sale of the property; and
- (i) A reasonable compensation for any necessary service rendered by said Trustee in the execution of this Trust for which the costs, fees and expenses are not herein provided, including a reasonable compensation (in addition to the counsel fees and other expenses) for any service under this Trust by the said Trustee in connection with any action or proceeding at law (including any

arising from the death of any Beneficiary hereunder), or in paying or attending to the payment of any taxes or assessments in connection with any income tax, inheritance tax or estate tax matter affecting the Trustee, any Beneficiary [173] hereunder, or the Trust property or any portion thereof.

Mortgages or trust deeds given by purchasers to the Beneficiary, or assigned to the Beneficiary, to cover principal payments, are, for the purpose of determining collection fees, to be treated as cash payments, but if held by the Trustee and under similar terms as agreements of sale, the regular collection fees applicable to agreements to convey as hereinabove stated will be charged.

It Being Understood that in no event shall the fees above designated in subdivisions (a) and (b) of this Section aggregate less than one-tenth (1/10th) of one per cent (1%) of the lowest authorized sales price of the Trust property, with a minimum of Five Hundred Dollars (\$500.00) for each year or fractional year of the life of this Trust.

Section 3:

As to the thirty-five (35) parcels of acreage hereinbefore described as Group or Parcel 2, the following schedule shall apply:

(a) An annual holding fee of one-twentieth (1/20th) of one per cent (1%) of the minimum listed selling price of the property;

(b) If the Beneficiary shall pay to the Trustee the release price for any such property, the Trustee shall make a reconveyance fee of one-tenth (1/10th) of one per cent (1%) of the minimum sales price of the property so released, with a minimum of Twenty-five Dollars (\$25.00) for each such release and reconveyance;

(c) If, when, and as any of said property in Group or Parcel 2 shall be subdivided, then the regular subdivision fees as set out in Section 1, shall be imposed upon said subdivision; [174]

(d) If the Trust shall be closed as to the unsubdivided portions of the trust estate after the payment of the indebtedness secured hereby in favor of the Payee, a fee of one-twentieth (1/20th) of one per cent (1%) of the minimum selling price of the property then reconveyed to the Beneficiary, its successors or assigns, shall be paid to the Trustee, with a minimum of One Hundred Dollars (\$100.00), which fee shall cover all fees and charges for such closing; and

(e) If the Trust shall be terminated in whole or in part prior to the sale and conveyance of all the Trust estate comprising Group or Parcel 1, or any portion of Groups or Parcels 2 and 4 subdivided prior to termination, said Trustee shall be entitled to receive one per cent (1%) of the value of the property transferred, as shown by the schedule or schedules of minimum sales prices then on file with the Trustee. No such termination shall, however, be made prior to the payment of the indebtedness owing the Payee hereunder.

Upon any such termination the Trustee shall not be required to convey any property upon which there are outstanding agreements to convey issued by it.

Article Eighteenth: The said Beneficiary, by its ratification of this Declaration of Trust, covenants and agrees to hold and save harmless the Trustee hereunder from any and all liability, claims, demands, injuries or damages which it may suffer or sustain by reason of the acceptance of this Trust and its position as Trustee hereunder, and

to protect said Trustee from any loss, damage, cost or expense by reason of the improvements of any character [175] whatsoever made on said property, and against all expenses incurred by any Agent of the Beneficiary or any Agent appointed by the Trustee at the request of the Beneficiary in the handling or sale of said property, and, upon demand of the Trustee, to furnish said Trustee with such further agreement of guaranty or indemnity as said Trustee shall deem necessary to protect said Trustee and said lands against any loss, damage, cost or expense by reason of such sale or improvements, but shall not be obligated by this Article to furnish any additional security.

Article Nineteenth: If the whole or any portion of the interest of the Beneficiary hereunder, or any Beneficiary, if there be more than one Beneficiary, or the proceeds or avails of any such interest, shall, at any time during the term or upon the expiration of this Trust, become liable for payment of any estate, inheritance, income or other tax, charge or assessment which said Trustee shall be required to pay, then, unless such taxes shall have been fully paid when due, by someone else, said Trustee is hereby authorized to pay such taxes before they shall become delinquent out of the whole or any portion of the interest so affected, and for that purpose is hereby generally and specifically authorized and empowered, without previous notice or demand to or from any person whomsoever, to sell at public or private sale, and convey sufficient portion of such interest up to the whole thereof as shall fully pay all such taxes, all costs and expenses of such sale, and all the sums, together with interest thereon at seven per cent (7%) per annum, payable quarterly, then due the Trustee under this Trust or which

it may have advanced or expended in the care, management [176] and protection of the Trust estate and in the payment of any of said estate, inheritance, income or other taxes thereon, and which said Trustee may be required to pay. Until such sums have been fully paid, they shall constitute a first lien on all the property subject to such tax in favor of said Trustee.

Article Twentieth: It Is Distinctly Understood that the interest under this Trust of the Beneficiary is personal property and that it has no right, title or interest in or to the property covered hereby, and has no rights or powers, except as herein expressly provided, to in any manner apply for or secure the dissolution or termination of this Trust, or the partition or the division of any of the Trust property; the sole right and power of the Beneficiary hereunder being to enforce the performance of the terms of this Trust, as expressly set forth in this Declaration.

Provided, However, that after the payment in full of the indebtedness secured hereby and the termination of the Agency Appointment, if any, made in accordance with the terms of this Trust, the Beneficiary, or if there are more than one, all of the Beneficiaries of this Trust, by a jointly written direction to the Trustee, may close and terminate this Trust. In no event, however, shall the Trustee be required to convey any property then covered by an existing agreement of sale executed by the Trustee, but the Trustee is expressly empowered and directed to retain the title to the property covered by any such existing agreement of sale, for the benefit of the Beneficiary hereunder. The proceeds and avails received from any such agreement of sale shall be applied by the Trustee, first, to the payment of any unpaid commission due, then

to the costs, fees and expenses of the Trustee, and the balance of the proceeds shall be paid by [177] the Trustee to the Beneficiary hereunder as its interest may appear.

Article Twenty-first: The Beneficiary hereunder authorizes the said Trustee to enter into a contract with a reliable Title Company, subject, however, to the prior written approval of the Beneficiary, authorizing said Title Company to issue individual guarantees of title or policies of title insurance on the lots or parcels in the subdivision or subdivisions of the Trust property, which contract shall be the usual form of said Title Company's contract for individual guarantees or policies of title insurance, and shall be issued by such Title Company at the times provided in contracts of sale.

Article Twenty-second: It Is Understood that the said Trustee makes no representation of fact as to the title to the property held under this Trust, but has the right to assume that the guarantee of title and/or policy of title insurance issued by any Title Company authorized to do business in the County in which the Trust property is situated, correctly shows the record title to said property and the incumbrances thereon.

Article Twenty-third: This Trust shall not cease or terminate in any event until all the costs, fees and expenses of said Trustee hereunder shall have been fully paid, nor until every party to this Trust has delivered to the Trustee for cancellation its copy of this Declaration of Trust.

Article Twenty-fourth: It Is Understood and Agreed that the term Beneficiary used herein shall include Beneficiaries; that the term Payee shall include [178] Payees;

that the masculine gender shall include the feminine and neuter genders; that the singular number shall include the plural number, all wherever and as the context of the language herein contained shall indicate.

Article Twenty-fifth: The Conditions and Provisions Hereof shall inure to and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. Provided, However, that no assignment of any interest in said property or in said Trust, or under the terms hereof, shall be binding upon the Trustee or shall be construed as notice to the said Trustee unless such assignment is in writing signed by the person transferring his interest, and also accepted in writing by the assignee to whom such assignment is made, and delivered to the said Trustee; together with Trustee's fee of Ten Dollars (\$10.00) as acceptance thereof, excepting only where such interest may pass or be transferred by Decree or Order of Court, and then only upon satisfactory proof of the regularity and validity of the proceedings in such matters being presented to said Trustee.

In Witness Whereof, the said Security-First National Bank of Los Angeles has caused these presents to be executed, in duplicate, in its name by its Vice President and Assistant Trust Officer, thereunto duly authorized, as of the 1st day of March, 1930.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

By J. D. CARSON

Vice-President

EBB

By F. M. RILEY

Assistant Trust Officer [179]

We, the undersigned, do hereby certify and declare that we are the Beneficiary and the Payee named in the above and foregoing Declaration of Trust and that the above and foregoing Declaration of Trust No. SS-70401 of the Security-First National Bank of Los Angeles correctly and accurately sets forth and declares the trusts under and upon which said property is held by the said Trustee, and we do also hereby agree to and do approve, ratify and confirm the same in all particulars.

And the undersigned Beneficiary for itself and its successors and assigns does transfer, assign and convey to said Trustee title to the beneficial interests under said Trust for conveyance of said interest, or part or parts thereof, in event of a sale as provided in Article Second of said Declaration of Trust.

Beneficiary

In Witness Whereof, the said / F. P. Newport Corporation, Ltd. has caused these presents to be executed in its corporate name, in duplicate, by its President and Secretary, thereunto duly authorized, and its corporate seal hereunto affixed as of the 1st day of March, 1930.

F. P. NEWPORT CORPORATION, LTD.

Beneficiary

Corporate

By F. P. NEWPORT

Seal

President

By T. L. DUDLEY

Secretary

Payee

In Witness Whereof, the said / Security-First National Bank of Los Angeles, Banking Department, has caused these presents to be approved and accepted in its corporate name, in duplicate, by its Vice President, there-

unto duly authorized, and its corporate seal hereunto affixed as of the 1st day of March, 1930.

SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES, Banking Department

Payee

Corporate
Seal

By EUGENE GRENSTED
Vice President

EBB
JDC
FMJ [180]

State of California
County of Los Angeles—ss.

On this 25th day of March, A. D. 1930, before me M. B. Glenn, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared F. P. Newport known to me to be the President and T. L. Dudley known to me to be the Secretary of the F. P. Newport Corporation, Ltd., the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same, in duplicate.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Seal

M. B. GLENN

Notary Public in and for said County
and State.

My commission expires December 5, 1931.

State of California
County of Los Angeles—ss.

August

On this 11th day of ~~March~~, A. D. 1930, before me Carolyn F. Erhardt, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Eugene Grensted, known to me to be the Vice President of the Security-First National Bank of Los Angeles, the national banking association that executed the within instrument, known to me to be the person who executed the within instrument on behalf of the association therein named, and acknowledged to me that such association executed the same, in duplicate.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

CAROLYN F. ERHARDT
Notary Public in and for said County
and State.

My commission expires June 18, 1934. [181]

State of California
County of Los Angeles—ss.

F. P. Newport, President and T. L. Dudley
Secretary, of F. P. Newport Corporation, Ltd., the Beneficiary herein named, each being duly sworn, each for himself, on behalf of said corporation, deposes and says, that the aforesaid Declaration of Trust is made in good faith

and without any design to hinder, delay or defraud any creditor or creditors.

Corporate
Seal

F. P. NEWPORT
President
T. L. DUDLEY
Secretary

Subscribed and Sworn to before me this 25th day of
March, 1930.

Seal M. B. GLENN
Notary Public in and for the County of Los
Angeles, State of California.
My commission expires December 5, 1931.

Trust No. SS-70401

EBB:M

10 copies

Compared:

Read by MAM.

Approved by EBB. [182]

We hereby certify the foregoing to be a full, true and correct copy of the original Declaration of Trust Number SS-70401, comprising Pages 1 to 45, both inclusive, on file in our office, and that we have carefully compared the same with the original.

SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES

EBB

By S. C. BAXTER
Assistant Trust Officer

Dated August 12, 1930.

Notice: Assignments hereunder must be filed with the Trustee to be effectual.

Assignments should be executed in duplicate and both copies presented to the Trustee for endorsement; one copy for the Trustee, and one copy for the Assignee. The Assignor must present his copy of the Trust Declaration to the Trustee at the time of its endorsement on such assignment. (Forms for assignments of Beneficial Interest will be furnished by the Trustee.)

Each copy of this Declaration of Trust must be surrendered to the Trustee when the Trust is closed.

Trustee's minimum fee for ordinary assignments	\$10.00
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Trustee's minimum fee for assignments through Court Orders	\$25.00
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Declaration of Trust

No. SS-70401

EBB-MAM

10 copies

Compared:

Read by MAM

Approved by EBB [183]

Trust No. SS-70401

EXHIBIT "A"

\$39375.00

Los Angeles, California,

May 26th, 1928

Three (3) Years after date, for value received, I promise to pay to F. P. Newport, or order, at Los Angeles, California, the sum of Thirty-nine Thousand Three Hundred Seventy-five and No/100 Dollars, with interest thereon from date hereof until paid, at the rate of six (6%) per cent. per annum, payable quarterly.

Should interest not be so paid, it shall become part of the principal and thereafter bear like interest therewith. Should default be made in payment of interest when due, the whole sum of principal and interest shall, at the option of the holder of this note, become immediately due. Principal and interest payable in United States gold coin. This note is secured by a mortgage upon real property.

T. L. DUDLEY

(Endorsement)

Los Angeles, Cal. May 24th, 1929. Pay to the Order of Security-First National Trust & Savings Bank

F. P. NEWPORT

Compared by

MAM/EBB [184]

Trust No. SS-70401

EXHIBIT "B"

ASSIGNMENT OF BENEFICIAL INTEREST

For value received F. P. Newport Corporation, Ltd., a corporation, of Los Angeles, California, does hereby grant, assign, transfer and set over unto Security-First National Bank of Los Angeles its total beneficial interest in and to the trust evidenced by that certain Declaration of Trust dated March 12, 1930, and issued by Title Guarantee and Trust Company, a corporation, under its Trust No. P-1512, together with a like interest in and to the net proceeds and avails arising or growing out of the said trust, and said Trustee is hereby authorized to pay and turn over unto said assignee all moneys and benefits growing out of the said interest hereby assigned and to consider said assignee a beneficiary under said trust to the extent of said interest.

This assignment is made, however, subject to all of the terms and conditions of said Declaration of Trust, and of all instruments amending and/or supplementing said Declaration.

Dated March 20, 1930.

F. P. NEWPORT CORPORATION, LTD.,

Corporate

By WM H. NEBLETT

Seal

Vice President

Attest T. L. DUDLEY

Secretary

ASSIGNEE'S ACCEPTANCE

The above assignment in and to said Trust No. P-1512 is hereby accepted, and I also hereby agree to and do approve, ratify and confirm said Declaration of Trust, and all instruments amending and/or supplementing said Declaration, in all particulars.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES
EBB

By S. C. BAXTER
Asst. Trust Officer

TRUSTEE'S ENDORSEMENT

The duplicate of this assignment filed in the Trust Department of Title Guarantee and Trust Company this 1 day of April, 1930.

TITLE GUARANTEE AND TRUST COMPANY,
By GEO. P. COLBY
Asst. Secretary

Approved

CHARLES R. WILSON

Asst. Trust Officer

Assignment Recorder

by E. M. MITCHELL 4/1/30

Trust Auditor

Compared

EBB:M [186]

Trust SS-70401EXHIBITS "C" AND "C-I"

Exhibit "C" and Exhibit "C-I" are in a separate cover and accompany this copy of this Declaration of Trust as though attached hereto and made a part hereof.

The above exhibits are copies of Policies (2) of the Title Insurance and Trust Company, its No. 1178917, on the real property covered by this Declaration of Trust as referred to on Page 6 hereof. [187]

EXHIBIT "C"TRUST NO. SS-70401SCHEDULE OF MINIMUM SALES PRICES AND
SCHEDULE OF RELEASE PRICES OF TRUST PROPERTY

Property Tract	Lot	Block	Group or Parcel No.	Group No. Re Newport Co.	Sales Price	Release Price
250	*Pt. 204		2-Ia-G	2	\$ 6,096.00	\$ 5,080
"	179½		" I-a A	2)		
"	180½		" I-a "	2)		
"	181½ & pt.		" I-a B	2)		
"	Laurita Place)		
"	184, 185,))		
"	186, 188,))		
"	189, 190 &	)	" I-a C	2)	58,200.00	48,500
"	192))		
"	S. ½ Colina Drive adjacent to 190	)	" I-a D	2)		
"	& 192))		
"	191 &)		
"	Pt. Colina Drive	)	" I-a E	2)		
"	193, 194 &)		
"	195	)	" I-a F	2)		
"	205 (Park)		" I-a F	2	97,560.00	81,300
"	Pt. 21		1 I-(A)	5	1,356.00	1,130
"	" 22		" I-(B)	5	1,764.00	1,470
"	" 103 (103C)		" I-(C)	5	1,020.00	850
"	" 175 (175A)		" I-(D)	5	1,020.00	850
"	" " (175B)		" I-(E)	5	1,020.00	850
"	" " (175C)		" I-(F)	5	1,020.00	850
"	" 178 (178B)		" I-(G)	5	1,116.00	930
"	" 179 (179A)		" I-(H)	5	1,116.00	930
"	" " (179B)		" I-(I-a)	5	1,116.00	930
"	" " (179C)		" I-(I-b)	5	1,116.00	930
"	" " (179D)		" I-(I-c)	5	1,116.00	930
"	" 181 (181C)		" I-(J)	5	1,356.00	1,130

* (See above)

393	39	" II (Windsor Rd)	5	4,800.00	4,000.00
1000	2	2 II-a	1)		
"	23	" II-a	1)		
"	24	" II-a	1)		
)		
1335	1	" III-a	1)		
"	2	" III-a	1)	300,000.00	241,180.00
)		
1336	4	" IV-a	1)		
"	5	" IV-a	1)		
"	6	" IV-a	1)		
"	7	" IV-a	1)		
)		
1473	66	1 III	5	1,284.00	1,070.00
"	75	1 III	5	336.00	280.00
"	76	1 III	5	1,224.00	1,020.00
"	192	1 III	5	1,356.00	1,130.00
"	193	1 III	5	1,356.00	1,130.00

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Tract	Lot	Block	Group or Parcel No.	Group No. Re Newport	Sales Price	Release Price
1473	194		1 III	5	\$ 1,356.00	\$ 1,130.00
"	195		1 III	5	1,356.00	1,130.00
"	196		1 III	5	1,356.00	1,130.00
"	205		1 III	5	1,224.00	1,020.00
"	207				1224.	1020.
"	206		1 III	5	1,224.00	1,020.00
"	208		1 III	5	1,224.00	1,020.00
"	209		1 III	5	1,224.00	1,020.00
"	234		1 III	5	672.00	560.00
2016	21	1	1 IV	5	252.00	210.00
Pacific Terminal)	21	4	1 IV	5	252.00	210.00
"	23	"	1 IV	5	252.00	210.00
"	28	"	1 IV	5	252.00	210.00
"	22	7	1 IV	5	312.00	260.00
"	28	"	1 IV	5	312.00	260.00
"	19	8	1 IV	5	252.00	210.00
"	21	"	1 IV	5	252.00	210.00
"	22	"	1 IV	5	252.00	210.00
"	27	"	1 IV	5	312.00	260.00
"	7	9	1 IV	5	252.00	210.00
"	15	20	1 IV	5	252.00	210.00
"	21	"	1 IV	5	252.00	210.00
"	17	22	1 IV	5	540.00	450.00
"	4	23	1 IV	5	672.00	560.00
"	15	28	1 IV	5	960.00	800.00
"	13	29	1 IV	5	1,356.00	1,130.00
Triangular piece at NE corner Tr. 2016		1 XV		5	1,356.00	1,130.00
(See Maria Delores Dominguez de Watson—Ro. San Pedro)						
2052	16		1 V	5	336.00	280.00

4044	1	1 VI	5	1,200.00	1,000.00
"	2	1 VI	5	672.00	560.00
"	3	1 VI	5	672.00	560.00
"	4	1 VI	5	672.00	560.00
"	6	1 VI	5	672.00	560.00
"	7	1 VI	5	672.00	560.00
"	20	1 VI	5	366.00	280.00
"	27	1 VI	5	366.00	280.00
5719	1	1 VII	5	1,020.00	850.00
"	2	1 VII	5	1,020.00	850.00
"	3	1 VII	5	1,020.00	850.00
6158	1	1 VIII	5	504.00	420.00
"	2	1 VIII	5	336.00	280.00
"	3	1 VIII	5	336.00	280.00
"	4	1 VIII	5	336.00	280.00
"	5	1 VIII	5	336.00	280.00
"	6	1 VIII	5	336.00	280.00
"	8	1 VIII	5	336.00	280.00
"	9	1 VIII	5	336.00	280.00
"	10	1 VIII	5	336.00	280.00
"	11	1 VIII	5	336.00	280.00
"	12	1 VIII	5	336.00	280.00
"	13	1 VIII	5	408.00	340.00
"	14	1 VIII	5	408.00	340.00
"	15	1 VIII	5	408.00	340.00
"	16	1 VIII	5	504.00	420.00

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Tract	Lot	Block	Group or Parcel No.	Group No. Re Newport Co.	Sales Price	Release Price
6158	17		1 VIII	5	\$ 372.00	\$ 310.00
"	18		1 VIII	5	336.00	280.00
"	20		1 VIII	5	336.00	280.00
"	23		1 VIII	5	336.00	280.00
"	25		1 VIII	5	336.00	280.00
"	26		1 VIII	5	336.00	280.00
"	27		1 VIII	5	336.00	280.00
"	28		1 VIII	5	336.00	280.00
"	29		1 VIII	5	336.00	280.00
"	30		1 VIII	5	336.00	280.00
"	31		1 VIII	5	504.00	420.00
"	32		1 VIII	5	336.00	280.00
"	33		1 VIII	5	336.00	280.00
"	34		1 VIII	5	336.00	280.00
"	35		1 VIII	5	336.00	280.00
"	36		1 VIII	5	336.00	280.00
"	37		1 VIII	5	336.00	280.00
"	38		1 VIII	5	372.00	310.00
"	39		1 VIII	5	408.00	340.00
"	40		1 VIII	5	480.00	400.00
"	41		1 VIII	5	540.00	450.00
"	42		1 VIII	5	960.00	800.00
"	a)					
"	43-b)		1 VIII	5	744.00	620.00
"	c)					
"	44-a		1 VIII	5	312.00	260.00

"	44-b	1	VIII	5	312.00	260.00
"	45-a	1	VIII	5	312.00	260.00
"	45-b	1	VIII	5	312.00	260.00
"	46-a	1	VIII	5	312.00	260.00
"	46-b	1	VIII	5	312.00	260.00
"	47-a	1	VIII	5	312.00	260.00
"	47-b	1	VIII	5	312.00	260.00
"	48-a	1	VIII	5	312.00	260.00
"	48-b	1	VIII	5	312.00	260.00
"	49-a	1	VIII	5	312.00	260.00
"	49-b	1	VIII	5	312.00	260.00
"	50-a	1	VIII	5	312.00	260.00
"	50-b	1	VIII	5	312.00	260.00
"	51-a	1	VIII	5	312.00	260.00
"	51-b	1	VIII	5	312.00	260.00
"	52	1	VIII	5	672.00	560.00
6409	12	1	IX	5	672.00	560.00
"	13	1	IX	5	816.00	680.00
"	14	1	IX	5	672.00	560.00
"	15	1	IX	5	816.00	680.00
"	22	1	IX	5	1,680.00	1,400.00
"	23	1	IX	5	1,356.00	1,130.00
"	24	1	IX	5	1,356.00	1,130.00
"	25	1	IX	5	1,680.00	1,400.00
"	26	1	IX	5	1,920.00	1,600.00
"	27	1	IX	5	1,356.00	1,130.00
"	28	1	IX	5	1,680.00	1,400.00
"	32	1	IX	5	1,920.00	1,600.00
"	33	1	IX	5	1,824.00	1,520.00
"	34	1	IX	5	2,040.00	1,700.00
"	35	1	IX	5	1,356.00	1,130.00
"	36	1	IX	5	1,920.00	1,600.00
"	37	1	IX	5	1,224.00	1,020.00

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Tract	Lot	Block	Group or Parcel No.	Group No. Re Newport Co.	Sales Price	Release Price
6409	38	1	IX	5	\$ 1,680.00	\$ 1,400.00
"	39	1	IX	5	1,470.00	1,180.00
"	40	1	IX	5	1,356.00	1,130.00
"	41	1	IX	5	1,470.00	1,180.00
"	42	1	IX	5	1,356.00	1,130.00
"	43	1	IX	5	1,470.00	1,180.00
"	44	1	IX	5	1,470.00	1,180.00
"	45	1	IX	5	1,680.00	1,400.00
"	46	1	IX	5	3,048.00	2,540.00
"	47	1	IX	5	2,712.00	2,260.00
"	48	1	IX	5	2,712.00	2,260.00
"	49	1	IX	5	2,664.00	2,220.00
"	50	1	IX	5	2,040.00	1,700.00
"	51	1	IX	5	2,040.00	1,700.00
"	52	1	IX	5	1,680.00	1,400.00
"	54	1	IX	5	1,824.00	1,520.00
"	55	1	IX	5	2,040.00	1,700.00
"	56	1	IX	5	1,224.00	1,020.00
"	57	1	IX	5	1,152.00	960.00
"	58	1	IX	5	1,152.00	960.00

"	59		1 IX	5	1,152.00	960.00
"	60		1 IX	5	1,152.00	960.00
"	61		1 IX	5	1,152.00	960.00
"	62		1 IX	5	1,152.00	960.00
7146	Pt. 4		1 X(A)		No sales price or release price	
"	Pt. 5		1 X(B)		" listed	"
"	Pt. 8		1 X(C)		"	"
"	Pt. 9		1 X(D)		"	"
"	Pt. 12		1 X(E)		"	"
"	Pt. 13		1 X(F)		"	"
(Dominguez	6	1	1 XI	5	408.00	340.00
(Harbor Tract	4	7	1 XI	5	408.00	340.00
"	1	9	1 XI	5	408.00	340.00
"	5	25	1 XI	5	408.00	340.00
"	4	29	1 XI	5	408.00	340.00
"	7	29	1 XI	5	408.00	340.00
"	35	29	1 XI	5	408.00	340.00
(Maria Delores Pt. 6			1 XV	5	1,356.00	1,130.00
(Dominguez de Note:	Said property is triangular.					
(Watson Att'l. parcel at NE corner Tract 2016.						
(Fernbrook	1	A	1 XII	5	1,560.00	1,300.00
Place	2	"	1 XII	5	1,200.00	1,000.00
"	10	"	1 XII	5	1,200.00	1,000.00
"	11	"	1 XII	5	1,200.00	1,000.00
"	12	"	1 XII	5	1,200.00	1,000.00
"	13	"	1 XII	5	1,500.00	1,250.00
"	16	"	1 XII	5	4,080.00	3,400.00
"	17	"	1 XII	5	2,844.00	2,370.00
"	18	"	1 XII	5	2,844.00	2,370.00
"	19	"	1 XII	5	2,844.00	2,370.00
"	20	"	1 XII	5	3,024.00	2,520.00
"	21	"	1 XII	5	3,024.00	2,520.00
"	22	"	1 XII	5	4,080.00	3,400.00
"	23	"	1 XII	5	2,400.00	3,000.00
"	3	B	1 XII	5	1,320.00	1,100.00
"	6	"	1 XII	5	1,080.00	900.00
"	11	"	1 XII	5	3,120.00	2,540.00
"	12	"	1 XII	5	3,120.00	2,540.00
"	13	"	1 XII	5	3,120.00	2,540.00

Tract	Lot	Block	Group or Parcel No.	Group No. Newport Co.	Sales Price	Release Price
(Long Beach	(1/4 int. in					
(Harbor Tract	C 14	7	1 XIII		(No sales or release price listed)	
" "	5	20	1 XIII	5	\$ 408.00	\$ 340.00
(Rcho Los	Pt. 20		2-V-a (A) & (B)	4)		
(Cerritos	" 30-Wilmington		2-V-a (C)	4)	72,000.00	60,000.00
"	Colony-		2-V-a (C)	4)		
"	31		2-V-a (C)	4)		

St. Rcho Los Cerritos (desig-)						
ated as Lots 18, 20 and 21)						
Map Bk. 1/10 Ass't Mp)-com-		3		4	264,000.00	220,000.00
nonly referred to as "Harbor"))				
"frontage".						
Iivas de	1	3	1-XIV (A)	5	2,712.00	2,260.00
erdugo	12	5	1-XIV (A)	5	1,692.00	1,410.00
"	1	6	1-XIV (A)	5	3,120.00	2,600.00
" E 20'- 23	11	1-XIV (A)		(No sales or release price listed)		
" 28	11	1-XIV (A)		" "	" "	" "
" 1	18	1-XIV (A)	5	1,152.00	960.00	
" 4	18	I-XIV (A)	5	1,020.00	850.00	
" 7	20	1-XIV (A)	5	1,224.00	1,020.00	
" Pt.-22		2-VII (C)	2	10,800.00	9,000.00	
" 1	23	2-VII-a) (A)&(B))	3	48,720.00	40,600.00	
" Also portion of Bonita Drive	24	2-VII-a (D)				
" 20	25	1-XIV (A)		(No sales or release price listed)		
" 1	26	1-XIV (A)		" "	" "	" "
" 21	26	1-XIV (A)		" "	" "	" "
" 1	27	1-XIV (B)	5	1,692.00	1,410.00	
" 2	27	1-XIV (B)	5	1,356.00	1,130.00	
" 1	29	1-XIV (C)	5	672.00	560.00	
" 15	29	1-XIV (C)	5	540.00	450.00	
" 1)	30	1-XIV (C)	5	1,080.00	900.00	
" 2)	30	1-XIV (C)	5	408.00	340.00	
" 3	30	1-XIV (C)	5	960.00	800.00	
" 7	30	1-XIV (C)	5	960.00	800.00	
" 8	30	1-XIV (C)	5			
" Pt.- 8	31	1-XIV (D)		(No sales or release price listed)		
" " - 8	31)	1-XIV (F))	5	1,224.00	1,020.00	
" " - 4	32)	1-XIV (E))	5			
" " - 8	32	1-XIV (G)	5	1,824.00	1,520.00	
" " - 3	34	1-XIV (H)	5	408.00	340.00	
" " - 4	34	1-XIV (H)	5	408.00	340.00	
" (6	34	1-XIV (H)	5	5,400.00	4,500.00	
" Lewis House)						
" " 16	34	1-XIV (H)	5	240.00	200.00	
" " 1	36	1-XIV (I)	5	1,524.00	1,270.00	
" " 2	36	1-XIV (I)	5	1,200.00	1,000.00	
" " 4	36	1-XIV (I)	5	1,200.00	1,000.00	
" " 6	36	1-XIV (I)	5	1,200.00	1,000.00	
" " 1	38	1-XIV (I)	5	1,470.00	1,180.00	
" " 3	38	1-XIV (I)	5	1,020.00	850.00	
" " 4	39	1-XIV (J)	5	1,620.00	1,350.00	
" " 8	39	1-XIV (J)	5	1,116.00	930.00	
" " 26	39	1-XIV (J)	5	1,116.00	930.00	
" " 28	39	1-XIV (J)	5	1,116.00	930.00	
" " 31	39	1-XIV (J)	5	1,116.00	930.00	
" " 32	39	1-XIV (J)	5	1,116.00	930.00	
" " 34	39	1-XIV (J)	5	1,116.00	930.00	
" " 35	39	1-XIV (J)	5	1,116.00	930.00	

Tract	Lot	Block	Group or Parcel No.	Group No. Re Newport	Sales Price	Release Price
Selvas de Verdugo	1	40	1-XIV (J)	5	\$ 1,356.00	\$ 1,130.00
"	23	40	1-XIV (J)	5	1,224.00	1,020.00
"	27	40	1-XIV (J)	5	1,200.00	1,000.00
"	28	40	1-XIV (J)	5	1,200.00	1,000.00
"	29	40	1-XIV (J)	5	1,200.00	1,000.00
"	Pt. 32	40	1-XIV (J)	5	1,200.00	1,000.00
"	" 1	41			(No sales or release price listed)	
"	" 2	41	1-XIV (J)	" "	" "	" "
"	3	41	1-XIV (J)	5	960.00	800.00
"	4	41	1-XIV (J)	5	1,116.00	930.00
"	8	41	1-XIV (J)	5	1,200.00	1,000.00
"	9	41	1-XIV (J)	5	1,200.00	1,000.00
"	12	41	1-XIV (J)	5	1,200.00	1,000.00
"	13	41	1-XIV (J)	5	1,200.00	1,000.00
"	14	41	1-XIV (J)	5	1,200.00	1,000.00
"	16	41	1-XIV (J)	5	1,200.00	1,000.00
"	21	41	1-XIV (J)	5	1,692.00	1,410.00
"	22	41	1-XIV (J)	5	1,356.00	1,130.00
"	25	41	1-XIV (J)	5	1,356.00	1,130.00
"	31	41	1-XIV (J)	5	1,356.00	1,130.00
"	33	41	1-XIV (J)	5	1,356.00	1,130.00
"	37	41	1-XIV (J)	5	1,200.00	1,000.00
"	1	42	1-XIV (J)	5	1,692.00	1,410.00
"	2)					
"	Pt. 3)					
"	" 4)	42	1-XIV (J)		(No sales or release price listed)	
"	" 6)					
"	" 7)					
"	" 8	42	1-XIV (J)	5	516.00	430.00
"	9	42	1-XIV (J)	5	1,020.00	850.00
"	10	42	1-XIV (J)	5	1,020.00	850.00
"	11	42	1-XIV (J)	5	2,400.00	2,000.00
"	" 18)					
"	" 19)					
"	" 21)	42	1-XIV (J)		(No sales or release price listed)	
"	" 22)					
"	1	43	1-XIV (J)	3	2,040.00	1,700.00
"	2	43	1-XIV (J)	3	1,224.00	1,020.00
"	3	43	1-XIV (J)	3	1,356.00	1,130.00
"	4	43	1-XIV (J)	3	1,020.00	850.00
"	5	43	1-XIV (J)	3	1,020.00	850.00
"	6	43	1-XIV (J)	3	960.00	800.00
"	7	43	1-XIV (J)	3	816.00	680.00
"	8	43	1-XIV (J)	3	816.00	680.00
"	9	43	1-XIV (J)	3	672.00	560.00
"	11	43	1-XIV (J)	3	2,040.00	1,700.00
"	12	43	1-XIV (J)	3	1,020.00	850.00
"	13	43	1-XIV (J)	3	1,080.00	900.00
"	14	43	1-XIV (J)		1,020.00	850.00
"	16)					
"	Pt. 17)	43	1-XIV (J)		(No sales or release price listed)	
"	" 19)					
"	" 20)	43	1-XIV (J)			
"	" 21)				2,400.00	2,000.00

Tract	Lot	Block	Group or Parcel No.	Group No. Re Newport	Sales Price	Release Price
Verdugo State	Pt. 3		2-VI-a	3	\$ 94,080.00	\$ 78,400.00
20 acres of)						
Eodora and)						
atalina Ver-)			2-VIII-a	3	3,360.00	2,800.00
go 47.95)						
llotment)						
5.50 acres)						
above)			2-IX	3	10,200.00	8,500.00
llotment)						

BB:M

5 copies

COMPARED:

IAM: EBB

No. 25308-M Re: F. P. Newport, Bankrupt McAdoo & Neblett vs. Sec.-First Nat'l. Bank McAdoo & Neblett Exhibit No. 3 Filed Apr. 19, 1937 Ernest R. Utley, Referee I. K.

[194]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE WHY
TRUSTEE SHOULD NOT BE DIRECTED TO
PAY 1938 AND 1939 FEDERAL INCOME
TAXES

I.

Comes Now the United States of America, by and through its attorneys, Charles H. Carr, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for District, and Eugene Harpole, Special Attorney of the Bureau of Internal Revenue, and respectfully represents and shows to this Court as follows:

That on the 8th day of April 1943, the *United District* Court for the Southern District of California, Central Division, made and entered its decision and Order in the

above entitled proceeding, pursuant to the Mandate of the Circuit Court of Appeals for the Ninth Circuit, by which it was determined, adjudged and decreed that said bankrupt estate and the Trustee in Bankruptcy, as such trustee, are indebted to the United States of America in the sum of \$19,363.65 for 1938 and 1939 income taxes.

That notwithstanding said Decision and Order of the District [18] Court said trustee in Bankruptcy has wholly failed, neglected and refused to pay said 1938 and 1939 income taxes or any part thereof, or the interest thereon, and the same and the whole thereof remains unpaid.

That your petitioner is informed and believes that the Security First National Bank of Los Angeles claims an interest in and the right to receive all of the available funds in the above entitled bankrupt estate.

Wherefore, your petitioner prays that an Order issue from this Court addressed to H. R. Metcalf, as Trustee in Bankruptcy, and the Security First National bank of Los Angeles, directing them to appear and show cause, if any they have, why the Trustee in Bankruptcy should not be ordered to pay the 1938 and 1939 federal income taxes, together with interest thereon.

Dated, this 24th day of September, 1943.

CHARLES H. CARR, E. H.

United States Attorney

E. H. MITCHELL, E. H.

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney, Bureau of Internal Revenue.

[Endorsed]: Filed Sep. 24, 1943, at 10 Min. past 12 o'clock P. M. Ernest R. Utley, Referee, by Phyllis Gray, Clerk.

[Endorsed]: Filed Oct. 18, 1944. [19]

[Title of District Court and Cause.]

ANSWER OF SECURITY-FIRST NATIONAL BANK OF LOS ANGELES TO PETITION OF UNITED STATES OF AMERICA RE PAYMENT OF 1938 AND 1939 INCOME TAXES

Comes now Security-First National Bank of Los Angeles, a national banking association, and answering the petition of the United States of America for an Order to Show Cause why H. F. Metcalf, as Trustee in Bankruptcy for F. P. Newport Corporation, Ltd., a corporation, Bankrupt, should not be directed to pay the 1938 and 1939 Federal income taxes, and denies and alleges as follows:

I.

The said Security-First National Bank of Los Angeles admits that it claims an interest in and to the right to receive all of the available funds in the above entitled bankrupt estate, as will more particularly appear herein.

II.

The said Security-First National Bank of Los Angeles denies that the United States Government, or any other person, firm or corporation, other than said Bank, has any lien or interest, or is entitled to receive all or any portion of the funds mentioned in the Petition of the United States of America, or in this answer thereto. [20]

III.

That on or about March 1, 1930, F. P. Newport Corporation Ltd., a corporation, borrowed from Security-First National Bank of Los Angeles, the sum of \$760,000.00, which is the same debt as that mentioned in the contract of January 12, 1937, more particularly hereinafter mentioned, including accretions thereto by way of accumula-

tion of interest, additional borrowings, advances for taxes, and for Trustee's fees and expenses.

IV.

On or about March 1, 1930, F. P. Newport Corporation, Ltd. a corporation, conveyed to the Security-First National Bank of Los Angeles title to certain real property by four different Grant Deeds, the same being recorded in Book 9902, page 28, Book 9868, page 150, Book 9850, page 181, and Book 9838, page 216, respectively, of Official Records of Los Angeles County, California. Concurrently with the execution of said Grant Deeds to said Bank, the said Bank executed and delivered to F. P. Newport Corporation, Ltd., its certain written Declaration of Trust, under date of March 1, 1930, now known and referred to as Trust No. D 7224, formerly known and numbered Trust SS 70401, by the terms of which it acknowledged that it had received a conveyance of said property as Trustee, with power of sale, as security for the payment of said loan of \$760,000.00 made by said bank to the said F. P. Newport Corporation Ltd., and as security for all advances, costs, Trustee's fees, and expense advanced and incurred under the terms of said Declaration of Trust, and upon all of the terms and conditions of said Declaration of Trust No. D 7224.

Thereafter F. P. Newport Corporation, Ltd., by three different Grant Deeds, conveyed to said Bank title to certain additional real property, under and pursuant to the terms of said Declaration of Trust, and as additional security for the payment of said indebtedness, said deeds being recorded in Book 11510, Page 239, Book 11493, page 271, and Book 9929, page 62, respectively of Official Records of [21] Los Angeles County, California.

That the properties transferred to said Bank and now held by it pursuant to the terms of said Declaration of Trust, consist largely of real property, some of which is located in what is known as "Verdugo Woodlands", and some in the San Fernando Valley, and some in the Wilmington Harbor Area. The Verdugo Woodlands property consists partly of subdivided lots and partly of unsubdivided acreage; the San Fernando Valley property consists of a ranch of approximately 320 acres, less the acreage sold by the above court; the Wilmington Harbor property consists of a number of subdivided lots, nine acres of which is on what is known as Channel No. 3 of the Long Beach Harbor, and approximately 20 acres of unsubdivided property in said harbor area.

V.

That on or about March 1, 1930, F. P. Newport Corporation, Ltd., as further and collateral security for the aforementioned indebtedness, by written assignment, pledged to the Security-First National Bank of Los Angeles the entire beneficial interest in and to said Trust No. D 7224. That on May 16, 1933, the said Bankrupt Corporation, F. P. Newport Corporation, Ltd., and F. P. Newport and Letitia J. Newport, his wife, granted to said Security-First National Bank of Los Angeles all of their right, title and interest in and to the real property situated on Channel No. 3, in the Long Beach Harbor area, containing nine acres more or less, together with the proceeds and avails therefrom, the said Grant Deed being recorded in Book 1226, page 21 of Official Records of Los Angeles County. That said property so conveyed had previously been conveyed to the said Bank on March 20, 1930, and said deed of May 16, 1933, confirmed and ratified said prior conveyance to said Bank. That the

legal title to said nine acre parcel of land was then vested in Title Guarantee & Trust Co., as Trustee. That subsequently to said above mentioned conveyance and prior to the execution of the oil lease hereinafter referred to, the said Bank at the request of H. F. Metcalf, Trustee in Bankruptcy, [22] and upon the order of the above entitled Bankruptcy Court, did advance a large sum of money to compromise the claims of various persons in and to said nine acre tract of land. That upon said adverse claims being so satisfied and discharged the legal title to said nine acre tract was conveyed to Security-First National Bank of Los Angeles, to be held by said Bank subject to the terms and conditions of said Declaration of Trust D 7224, and the contract of January 12, 1937, as supplemented, modified and amended. That under the order of the said Bankruptcy Court, said advance was added to and became a part of the indebtedness owing to said Bank by said Trustee in Bankruptcy and said Bankrupt. That under the terms of said Declaration of Trust No. D 7224, and the said Agreement of January 12, 1937, as supplemented, modified and amended, said real property and the rents, issues and profits thereof were held by said Security-First National Bank of Los Angeles, as Trustee, to secure the payment of all of the obligations owing by said Trustee in Bankruptcy and said Bankrupt to said Bank.

VI.

The indebtedness secured by said Declaration of Trust and the collateral pledge of the Beneficial Interest therein being long past due, the said Security-First National Bank of Los Angeles, as Trustee under said Declaration of Trust, did in accordance with the provisions of said Declaration of Trust declare the entire unpaid balance of the obligation to be due, and fixed the date for the

sale of the real property belonging to said Trust for March 29, 1935.

VII.

On March 19, 1935, an Involuntary Petition in Bankruptcy was filed against the above named Bankrupt. Thereafter, and on or about March 25, 1935, H. F. Metcalf was appointed Receiver in Bankruptcy of all the property and assets of the above named Bankrupt Corporation, including the property held in said Trust, and the above entitled Court duly restrained said Security-First National Bank of Los Angeles from proceeding with said foreclosure sale. [23]

VIII.

That on or about March 25, 1935, said H. F. Metcalf duly qualified as such Receiver and went into possession of the property and assets of said Bankrupt Corporation, including the real property conveyed to said Security-First National Bank of Los Angeles, as Trustee, as hereinabove alleged.

IX.

That from time to time thereafter, and prior to the 12th day of January, 1937, said Bank made application to the above entitled court for leave to foreclose and sell that certain real property held by it under the said Trust No. D 7224. That the court, over the objection of said Security-First National Bank of Los Angeles, continued said restraining order in full force and effect.

X.

That subsequent to the 25th day of March, 1935, and prior to the adjudication of said F. P. Newport Corporation, Ltd., as a Bankrupt, extensive negotiations and conferences were had by and between the Security-First National Bank of Los Angeles, the Receiver and their re-

spective counsel, and other interested parties, looking to, and in an effort to, devise a method for the liquidation of the properties held by said Bank under its Trust hereinabove mentioned, and to obviate the necessity of litigation between said Bank and said Bankrupt Estate. Following these conferences and negotiations, an agreement in writing, bearing date of January 12, 1937, was made and executed by and between the Bankrupt Corporation, the said Bank and the said Receiver, which agreement was subsequently supplemented and modified.

XI.

That the said agreement, together with a supplement thereto, and modifications thereof, was duly approved, ratified and confirmed by this court, and the District Court of the United States of America. That thereafter an appeal from the order so approving and ratifying said agreement, supplement thereto and modifications thereof, was taken to the United States Circuit Court of *Appeal* (Ninth Circuit) which court affirmed the said order. That a Petition for a Writ of Certiorari to review the said order was filed with the Supreme Court of the United States and said Petition was denied. [24]

XII.

Thereafter, on January 12, 1937, said F. P. Newport Corporation, Ltd., was duly adjudicated a bankrupt.

XIII.

Under date of February 25, 1937, Hubert F. Laugharn, was appointed Trustee in Bankruptcy, and was succeeded as Trustee on March 18, 1937, by H. F. Metcalf, who ever since said date has been and now is in possession of the property and assets of the Bankrupt Corporation, as such Trustee. That said contract as supplemented and

modified was duly signed by said H. F. Metcalf as Trustee in Bankruptcy under the order and direction of the Bankruptcy Court.

XIV.

By the terms of said agreement as so supplemented and modified, it was stipulated that the principal amount of the indebtedness due to said Security-First National Bank of Los Angeles amounted to \$1,304,918.77, and should be payable in installments as therein provided, and that all indebtedness due said Bank should be paid on or before September 7, 1940. The said agreement, as modified, among other things, provides:

"That while the said Declaration of Trust No. D 7224 and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring that all bankruptcy funds be accounted for by the Trustee and be distributed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D 7224 and the agreement of January 12, 1937, as modified hereby. [25]

"Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds or moneys so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other dispo-

sition of property under said Trust shall, until the indebtedness due the Bank has been paid and except as hereinafter provided, be, while in his possession, impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate."

XV.

Thereafter, and with the approval of the Court, said Trustee in Bankruptcy, and Security-First National Bank of Los Angeles, as Trustee, and the Bankrupt, did on or about the 14th day of January, 1938, make and enter into a lease with the Universal Consolidated Oil Company, as Lessee, under and by the terms of which there was let to said Lessee a portion of the real property of said Bankrupt Estate, the title to which stands of record in the name of said Security-First National Bank of Los Angeles, as Trustee, and as security for the obligation owing to said Bank, for the purpose of producing oil and gas from said property. Thereafter the Lessee discovered oil and gas on said property and has produced oil and gas therefrom in commercial paying quantities. [26]

XVI.

That pursuant to said Order of Court, approving said agreement, supplement, and modifications, the oil royalties received by said Trustee in Bankruptcy from the Universal Consolidated Oil Company have been deposited in a special account carried in the name of the Trustee in Bankruptcy herein with the Head Office of the Security-First National Bank of Los Angeles, Sixth and Spring Streets. That all royalties so received by said Trustee, with the exception of approximately \$11,222.19, were and have been, from time to time, disbursed by said Trustee in Bankruptcy to said Bank, with the approval of the court, and were in turn credited by said Bank, on advances and on the interest and the principal of the said obligation owing to it.

XVII.

That said Trustee in Bankruptcy under and by virtue of said agreement, supplement and modification thereof, has received and disbursed oil royalties to the said Security-First National Bank of Los Angeles, and said Bank, under and by virtue of said Declaration of Trust, Assignment and Beneficial interest, and said Agreement, Supplement and modifications, has, ever since the date of the first receipt of said royalties, been in possession of said royalties, subject only to the technical possession of the Trustee in Bankruptcy in the first instance.

XVIII.

That no portion of said royalties constitutes a part or parcel of the general assets of the Bankrupt Estate, but

the same constitutes a part of the security of the Security-First National Bank of Los Angeles for the indebtedness owed by the Bankrupt, and no portion thereof can be applied to or on account of any tax claims of the United States Government, or for the purpose of the payment of the expenses of the administration of said Bankrupt estate. [27]

XIX.

That at no time since the date of adjudication has the Bankrupt been in possession of the real property or oil royalty securing the indebtedness due the said Security-First National Bank of Los Angeles.

XX.

That the said Trustee in Bankruptcy ever since the date of said Bankruptcy has been and now is in physical possession of the real property, the title to which stands in the name of the Security-First National Bank of Los Angeles, as Trustee, for and on behalf of said Bank as security for the payment of the above mentioned indebtedness.

XXI.

That there remains unpaid, due and owing to Security-First National Bank of Los Angeles by the Bankrupt Estate the principal sum of \$617,303.12, together with interest thereon from January 7, 1943, at the rate of four per cent (4%) per annum, compounded quarterly, and Trust advances in the sum of \$17,897.73, and Trustee's fees in the sum of \$4,518.22, all of which is secured by

the above mentioned Declaration of Trust No. D 7224, and the Agreement of January 12, 1937, as modified and amended, as above set forth.

Wherefore, said Security-First National Bank of Los Angeles prays:

- (1) That the United States of America be denied any relief whatsoever under its Petition.
- (2) That the court decree that under and by virtue of said Declaration of Trust and Assignment of Beneficial Interest therein and the Agreement of January 12, 1937, the supplement thereto and modifications thereof, that the said Security-First National Bank of Los Angeles has a first and prior lien on all of the real property subject to the terms of said Declaration of Trust, and on the rents, issues and profits therefrom, and is entitled to receive, without [28] deduction, all of the oil royalties, rents, issues and profits derived from the said real property securing the indebtedness due it from the said Bankrupt, to the exclusion of the United States of America, or any other person, firm or corporation.
- (3) That the court decree that the Trustee in Bankruptcy is in possession of said real property, oil royalties, rents, issues and profits derived from the said real property, for and on behalf of said Security-First National Bank of Los Angeles.
- (4) That the court order the Trustee in Bankruptcy to continue to disburse to the Security-First National Bank of Los Angeles said oil royalties, and other rents, issues

and profits in compliance with the Court orders approving the Agreement of January 12, 1937, the supplement thereto and modifications thereof, free and clear of any claim of the United States, or of the Trustee's expenses of administration, and

- (5) For such other and further relief as may be proper.

SECURITY-FIRST NATIONAL BANK
OF LOS ANGELES

By R. T. Adams
Asst. Secty.

W. C. SHELTON and
GEORGE W. BURCH, JR.

By W. C. Shelton
Attorneys for Security-First
National Bank of Los Angeles [29]

[Verified Oct. 13, 1943.]

Received copy of the within Answer this day of October, 1943. Eugene Harpole, Attorneys for United States of America.

Received copy of the within Answer this 13th day of October, 1943. Bailie, Turner & Lake, SY, Attorneys for H. F. Metcalf, Trustee in Bankruptcy for F. P. Newport Corpt. Ltd.

[Endorsed]: Filed Oct. 13, 1943 at Min. past 2 o'clock P. M. Ernest R. Utley, Referee; B M Clerk.

[Endorsed]: Filed Oct. 18, 1944. [30]

[Title of District Court and Cause.]

ANSWER OF H. F. METCALF, AS TRUSTEE IN
BANKRUPTCY HEREIN, TO PETITION OF
UNITED STATES OF AMERICA RE PAY-
MENT OF 1938 AND 1939 INCOME TAXES

Comes now H. F. Metcalf, as Trustee in Bankruptcy herein, and answering the petition of United States of America for an order to show cause why said Trustee should not be directed to pay the 1938 and 1939 federal income taxes, and alleges as follows:

I.

That said Trustee in Bankruptcy has not paid the 1938 and 1939 income taxes in the amount of \$19,363.65 for the reason that he has not had sufficient funds with which to pay such taxes.

II.

That on or about January 12, 1937, an agreement was made and entered into by and between the Security-First National Bank of Los Angeles, the F. P. Newport Corporation, Ltd., and H. F. Metcalf as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd. That the said agreement, together with a supplement thereto and modifications thereof, was duly approved, ratified and confirmed by this Court and the said District Court. That thereafter an appeal from the order so approving and ratifying said agreement, supplement thereto and [31] modifications thereof, was taken to the United States Circuit Court of *Appeal* (Ninth Circuit) which Court affirmed the said order. That a petition for a writ of certiorari to review the said order was filed with the Supreme Court of the United States and that said petition was denied.

III.

That by the said agreement as so supplemented and modified it was provided that the principal amount of the indebtedness due to Security-First National Bank of Los Angeles amounted to \$1,304,918.77 and should be paid in installments as therein provided and that all indebtedness due said Bank should be paid on or before September 7, 1940. That in and by said agreement, approved by this Court, it is provided as follows:

"That while the said Declaration of Trust No. D 7224 and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring that all bankruptcy funds be accounted for by the Trustee and be disbursed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D 7224 and the agreement of January 12, 1937, as modified hereby.

"Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds or moneys so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust [32] shall, until the indebtedness due the Bank has been paid and except as hereinafter provided, be, while in his posses-

sion, impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate. No provision of said agreement of January 12, 1937, or this supplement thereto is made or entered into, directly or indirectly, for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorney of any party in interest in this bankruptcy proceeding, for services rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to anyone whomsoever from the assets of this Bankrupt Estate, is, in accordance with the law, left entirely to the determination of the court having jurisdiction of this bankruptcy proceeding, unaffected by any provision, term or condition, express or implied, of said contract of January 12, 1937, or of this supplement thereto."

IV.

That by and with the approval of this Court said Trustee in Bankruptcy made and entered into a lease with Universal Consolidated Oil Company, as Lessee, under and by the terms and provisions of which there was let to said Lessee a portion of the real property of this estate

for the purpose of prospecting for and producing oil and gas from said property. That subsequent to the execution of the [33] said lease the Lessee discovered oil on said property and has produced oil and gas therefrom. That is pursuance of the terms of the said lease said Lessee has paid to said Trustee in Bankruptcy royalties on said gas and oil so produced from said property. That the royalties so paid to said Trustee have been in excess of \$100,000.00, all as will more fully appear from the Trustee's reports on file herein.

V.

That pursuant to an order of this Court the oil royalties received by said Trustee from Universal Consolidated Oil Company have been deposited in a special account carried in the name of the Trustee in Bankruptcy herein with the head office of the Security-First National Bank of Los Angeles, Sixth and Spring Streets. That, from time to time, said Trustee has paid to said Bank in excess of \$100,000.00 out of the funds so deposited in said account. That the said payments were made with the approval of this Court and were credited by said Bank on the principal of the obligation owing to it. That said Trustee has on deposit in said account at the present time the sum of \$11,222.19, all of which represent royalties received from said Universal Consolidated Oil Company pursuant to the terms of the said lease.

VI.

That the legal title to the said real property covered by the said lease to Universal Consolidated Oil Company stands of record in the name of the Security-First National Bank of Los Angeles as security for the obliga-

tion owing to said Bank, all as more particularly set forth in said agreement of January 12, 1937, as supplemented and modified as aforesaid.

VII.

That said Security-First National Bank of Los Angeles claims and asserts that it has a lien on all of the rents, issues and profits derived from said real property, including a lien on all [34] oil royalties paid or to be paid under the terms and conditions of said lease with Universal Consolidated Oil Company, and asserts that its lien is superior and paramount to any right which United States of America may have in the matter of the payment of said income taxes. That said Bank claims and asserts that United States of America is not entitled to receive any of the oil or gas royalties hereinbefore mentioned or to have its said claim paid out of said royalties or any part thereof. That said Trustee in Bankruptcy has no other funds with which to pay said income tax claim.

VIII.

That the income taxes due United States of America for the years 1938 and 1939 are not entitled to priority over any other expense of administration of this estate. That if United States of America is entitled to have its claim for said taxes paid out of any of the royalties hereinbefore mentioned, then other expenses of administration should be paid out of the same funds on equal parity with the said claim.

Wherefore The Trustee In Bankruptcy Herein Prays: That this Court determine whether or not the expenses of administration, including the claim for income taxes due United States of America, are payable out of oil royalties received or to be received from the Universal Consolidated

Oil Company, and for such other and further relief as may be proper.

H .F. Metcalf
As Trustee in Bankruptcy of F. P. Newport
Corporation, Ltd.

BAILIE, TURNER & LAKE

By Allen T. Lynch

Attorneys for said H. F. Metcalf. [35]

[Verified Sept. 30, 1943.]

[Endorsed): Filed Oct. 1, 1943, at Min. past 5 o'clock P. M. Edmund L. Smith, Clerk; by E. N. Enstrom, Jr., Deputy.

[Endorsed]: Filed Nov. 3, 1943. [36]

[U. S. EXHIBIT NO. 1—BY REFERENCE]

Exhibit "A"

AGREEMENT.

This Agreement, made and entered into this 12 day of January, 1937, by and between F. P. Newport Corporation, Ltd., a Delaware Corporation, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bankrupt, H. F. Metcalf, as Receiver for F. P. Newport Corporation, Ltd., an alleged Bankrupt, hereinafter called the Receiver, and Security-First National Bank of Los Angeles, a National Banking Association, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bank, Witnesseth:

Recitals:

The Bankrupt is indebted to the Bank for money loaned to the Bankrupt, or advanced for its use, under the terms of the Trust Declaration, hereinafter referred to, and for costs and expenses incurred by the Bank in connection therewith, in the following sums, to-wit:

1. Unpaid principal, evidenced by promissory notes executed by the Bankrupt to the Bank	\$ 1,013,928.78
2. Interest on said notes, up to February 1, 1937	\$ 219,887.25
3. Trust advances for benefit of the Trust Estate, under the terms of said Trust	\$ 105,365.93
4. Interest on said Trust advances to February 1, 1937.....	\$ 9,871.75
5. Necessary costs and expenses incurred by the Trustee in connection with the preservation of the Bank's security for its indebtedness.....	\$ 2,402.67
6. Interest thereon to February 1, 1937..	273.00
<hr/>	
Total.....	\$ 1,351,729.38

All of said indebtedness is secured by the property conveyed by the Bankrupt to the Bank, as Trustee, in Trust with power of sale, to secure the same, and by a Pledge by the Bankrupt of the entire beneficial interest in and to the said Trust. Said Trust is evidenced by a written Declaration of Trust No. D 7224, formerly numbered S S 70401, signed by the Bank under date of March 1, 1930, and approved on said date by the Bankrupt. Reference is hereby made to said Declaration of Trust for the full terms and conditions thereof.

All of said indebtedness is long overdue, and no interest on said indebtedness has been paid by the Bankrupt for several years and all taxes and assessments on the Trust properties have been advanced by the Bank for several years. [68]

An involuntary Petition to have the Bankrupt adjudicated a Bankrupt, has been pending since the month of March, 1935. Said Petition is at issue, but is still undecided.

Upon the filing of said involuntary Petition in Bankruptcy, to-wit: on or about the 27th day of March, 1935, the Bankruptcy Court before which said Petition was pending, issued its Order restraining and enjoining the Bank from foreclosing its said security for said indebtedness. Said restraining order is now, and ever since said date has remained in full force and effect.

On or about the 27th day of March, 1935, the Court appointed the above named Receiver, H. F. Metcalf, as Receiver in Bankruptcy, for properties of the Bankrupt, and he thereupon duly qualified and ever since said date has been, and now is, acting as such Receiver.

The Bankrupt and the Receiver are desirous of further postponing the foreclosure by the Bank of said security, for non-payment of said indebtedness, and are desirous of starting the immediate liquidation of said indebtedness of the Bank, by the sale of certain of the real properties held by the Bank in said above referred to Trust.

The Bank is willing to delay further the foreclosure of the said security and will agree to the immediate sale of certain of the assets in said Trust on the terms, and subject to the conditions hereinafter contained, and not otherwise, hence this Agreement.

The Agreement.Order of Court allowingReceiver to execute Required.

The Receiver agrees to petition the Bankruptcy Court forthwith for leave to execute this agreement. Should the Court refuse to grant leave to the Receiver to so execute this agreement, and thereafter the Receiver fail to execute it, the Bank, at its election, shall have the right to cancel this agreement.

Adjudication of Bankruptcy required.

The Bankrupt, F. P. Newport Corporation, Ltd., agrees that it will make no resistance whatever in the pending petition to have it declared a bankrupt, said Petition and Answer now being set for hearing on January 12, 1937, before the Honorable Paul J. McCormick, Judge of the Bankruptcy Court. It is understood and agreed that unless a Decree adjudicating said corporation a Bankrupt be entered prior to the 15th day of January, 1937, and that said order thereafter become final without appeal, that this contract, at its option, may be terminated and cancelled by the Bank. [69]

Approval by Trustee and Court.

Immediately upon a Trustee in Bankruptcy being appointed by the Court in said proceeding, this contract shall be presented, by proper petition of the Trustee, to the Bankruptcy Court, for its approval, and for an order authorizing the said Trustee in Bankruptcy to become a party thereto and be bound by the terms and conditions thereof. The approval of the said Bankruptcy Court and the due execution of this Contract by the said Trustee

shall be conditions precedent to the said contract continuing as a binding and effective obligation on the Bank, and should said Court refuse to approve this agreement, or should the Trustee fail to execute the same, and become bound by all of the terms and conditions thereof within (5) days after the order approving the same has been entered, then this contract shall become utterly void and of no further force and effect, and the Bank shall be relieved of any and all obligations thereunder.

Reduction of Indebtedness.

Provided the above conditions are complied with, the Bank agrees to reduce the amount of the debt due it from the Bankrupt, as of the first day of February, 1937, to the sum of \$1,270,451.12, and to waive the difference between the amounts due as of said date, and said sum of \$1,270,451.12.

Reduction of Interest.

The said sum of \$1,270,451.12 shall bear interest, from February 1, 1937, at the rate of four per cent (4%) per annum, payable quarterly, and if not so paid, to bear like interest as the principal. It is agreed, however, that the first installments of interest shall be payable on August 1, 1937.

The principal of said indebtedness shall be payable as follows:

1. \$ 35,000.00 on or before six months from February 1, 1937.
2. \$ 65,000.00 on or before 12 months from February 1, 1937.
3. \$250,000.00 on or before 24 months from February 1, 1937.

4. \$150,000.00 on or before 30 months from February 1, 1937.
5. The balance of said indebtedness on or before thirty-six (36) months from February 1, 1937.

Foreclosure of Security forBreach of Agreement.

So long as all of the terms and conditions of this agreement are complied with by the other parties hereto, the Bank agrees not to foreclose the security held for the payment of said indebtedness.

It is distinctly understood and agreed, however, that should any installment of principal or interest be not paid as herein provided, or any taxes or assessments, be not paid ten days prior to the delinquency thereof, [70] or any of the terms and conditions of this agreement, and the Declaration of Trust, herein referred to, be not complied with in the manner and at the times herein, and in said Declaration of Trust provided, that the Bank, except as otherwise provided for herein, may at it's option call immediately due and payable the entire amount of the indebtedness then owing by the Bankrupt, or the Bankrupt Estate, and may immediately foreclose the security held by it, by such procedure as is provided for in said Declaration of Trust, or may foreclose the same by an action in court; provided, however, that the Bank expressly waives the right to foreclose the beneficial interest in said Trust as a pledge, as provided for in said Declaration of Trust, and also waives the provision of said Trust contained on page 12 commencing in line 23 with the word "or" and up to and including the word "code" in line 27. Notwithstanding anything to the contrary herein contained, it is agreed that the Bankrupt, or the Trus-

tee in Bankruptcy shall have sixty (60) days after written notice within which to remedy any default for which notice has been given, before the Bank shall have the right to accelerate deferred payments of said indebtedness, and commence foreclosure of said security. The said sixty day notice herein provided for, shall be deemed the sixty day notice provided for in said Declaration of Trust.

Waiver of Statute of Limitations.

In consideration of the execution of this agreement, the Bankrupt, the Receiver and the Trustee, when appointed, qualified, and upon becoming a party hereto, expressly waive the provisions of any statute limiting the time when any action may be brought by the Bank on the indebtedness hereinabove referred to, or hereinafter incurred pursuant to the terms of this agreement and/or the Trust herein referred to.

Waiver of Defenses in Foreclosure.

It is understood that one of the principal considerations moving to the Bank in this agreement is the willingness of the other parties hereto to waive any and all defenses they may claim to have to the foreclosure of the security held by the Bank, other than as to the correct amount claimed to be due the Bank. It is, therefore, expressly agreed that, provided the debt be then due, as provided for herein, in any foreclosure proceeding brought pursuant to the terms of said Declaration of Trust, and/or this agreement, no defense thereto will be made, other than to determine the correct amount remaining due and unpaid from the Bankrupt to the Bank, at the time of said foreclosure. And [71] it is expressly agreed that

the parties hereto will not seek to enjoin or delay such foreclosure, if and when brought by the Bank.

To enable the Trustee, hereinafter appointed, to make the payment of taxes, assessments, interest and principal herein provided to be made at the times herein specified, and to do all other things herein agreed to be done, it is understood and agreed that the Trustee may negotiate for the immediate sale of certain parcels of real property now held in said Trust, and described in a Schedule annexed hereto, marked Exhibit "A", and hereby referred to and made a part hereof.

All properties not described in said Exhibit "A" shall be retained in said Trust and be leased or sold on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy, and shall be subject to the approval of the Bankruptcy Court.

Any and all sales of said real property described in Exhibit "A" shall be on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy, and shall be subject to the approval of the Bankruptcy Court.

All contracts for the sale of said property shall be issued by the Bank. All payments for any of the Trust property shall be made to the Bank.

Release Price Agreed Upon.

In this connection, the Bank agrees, provided no default exists which has not been cured within sixty (60) days, as Provided for Herein, to convey the above described parcels of said property to such purchaser or purchasers as the Trustee in Bankruptcy may direct, when there shall have been paid to the Bank, as release prices thereon, the amount of money agreed upon by the parties hereto, and set forth in Exhibit "A" attached hereto; provided, how-

ever, that where the Bank shall have executed and delivered a contract of sale for any part or portion of said property to any third party, no release, transfer or conveyance thereof shall be demanded for said property other than to the Buyer thereof under said contract, so long as said sales contract remains outstanding.

Release Price Credited Only on Principal.

All sums received on the release price of said property shall be credited upon only the principal of the Bankrupt's obligations to the Bank; it being expressly agreed that all payments of interest, taxes and assessments and further Trust Advances and expenses, except as hereinafter provided, shall be made by the Trustee in Bankruptcy from funds otherwise in the Bankrupt's estate, or from funds, if any, in the hands of the Bank, as Trustee, as herein-after provided. [72]

Distribution of proceeds from Sales.

Out of the first money paid to the Bank, on any sale of said Trust Properties, there shall first be paid all costs of sale, including commissions and Title Charges, not to exceed, however, twenty per cent. (20%) of the sale price of said property.

The Special Fund.

All moneys thereafter received on said sales contracts shall be placed by the Bank in a special fund until the amount of the principal remaining due on said sales contract equals the amount of the release price agreed upon for the parcel of property so sold.

Thereafter all such payments shall be applied upon the principal of the indebtedness owing to the Bank by the Bankrupt until the release price has been fully paid.

All interest on any contract or Trust Deed note shall, when received, be placed by the Bank in the Special Fund.

Disbursement of the Special Fund.

Out of the Special Fund, the Bank shall pay all taxes, assessments, insurance, interest and other charges and expenses of said Trust No. D 7224 not theretofore paid by the Trustee in Bankruptcy. After payment out of said Special Fund of all current interest, taxes, assessments and Trust Expense, and after first setting aside in said Special Fund a reserve sufficient to pay all interest, taxes, assessments and Trust Expense for one additional year, the remainder of the money in said Special Account shall be paid over to the Trustee in Bankruptcy.

Use of Paper to Meet Quotas on Principal.

Although installment payments on the principal of the Bankrupt's agreed obligations have been hereinabove provided to be made on specific dates, it is, nevertheless, understood and agreed that said payments or quotas of the debt will be deemed to have been met, provided that for such portion thereof as shall not have been paid in cash, the Bank shall hold, as trustee of said Trust, Sales Contracts, or First Trust Deeds received from the sale of said real estate sufficient in amount so that the release prices payable thereon shall equal the amount of the unpaid portion of the said principal payments or quotas. The Bank reserves the right to approve or disapprove of said paper for this purpose, but such right shall not be exercised in an arbitrary or unreasonable manner.

Such paper, so approved by the Bank, for said purpose, shall only be available for said purpose so long as it remains in good standing, and without [73] any delinquency in the payments thereon. Should any such paper become delinquent in any respect, the Trustee in Bankruptcy shall have sixty (60) days after notice thereof, to effect a reinstatement thereof or to provide new paper acceptable to the Bank in lieu thereof. Failure to so reinstate said paper or to replace the same, or to pay in cash the amount for which it has been accepted on the quotas, shall constitute a breach of this agreement, entitling the Bank to proceed with the foreclosure of its security without giving any additional notice of such breach of agreement.

Such paper shall not be accepted by the Bank as payment on said indebtedness, but only as security therefor.

Temporary Collection of rents by
Trustee in Bankruptcy.

Although the Bank, under the express terms and conditions of said Trust No. D 7224, is entitled to execute all leases for Trust Property, and to demand and receive all rents, issues and profits from the properties held by it in Trust, the Bank agrees that, for a period of one (1) year from the first day of February, 1937, the Receiver, and, after his appointment, the Trustee in Bankruptcy, may collect and use all such rents, issues and profits, except the rents, issues and profits from oil, as hereinafter provided, up to a maximum of seven thousand dollars (\$7,000.00). All excesses above said sum to be promptly paid over to the Bank to be applied upon such of the obligations due the Bank by the Bankrupt as the Bank may elect to apply them upon. It is, however,

expressly agreed that hereafter all leases and rental agreements shall be made and executed by the Bank, as provided for in said Trust Declaration.

Should there not be paid over to the Trustee in Bankruptcy out of the Special Fund, as hereinabove provided, the sum of \$7,000.00 during the second year, then out of the said rents, issues and profits from said real property there shall be paid over to said Trustee in Bankruptcy sufficient to equal the said sum of \$7,000.00.

Oil Income and its Distribution.

The right to collect such rents, issues and profits by the Trustee in Bankruptcy, as is provided for herein, shall be expressly subject to the condition that any rents, issues and profits from any of said property for bonuses, rentals, or royalties for or from any oil lease thereon, shall be collected only by the Bank, and shall in no event be paid over to, or collected by said Trustee in Bankruptcy. [74]

All income from Oil, in the nature of bonuses, rentals and royalties from any of the properties held by the Bank in Trust, so paid to the Bank, shall be placed by the Bank in a Special Oil Account.

The funds in said Account shall be available to the Trustee in Bankruptcy for the purpose of making up any deficiency in the "Special Fund", to pay interest, taxes, assessments and expenses, as hereinabove provided, in order to obviate a default; provided, however, that all sums taken from said Oil Account for such purpose shall be repaid to said Oil Account from moneys thereafter coming into Special Fund and not needed to pay other or additional interest, taxes, assessments, or expenses then due.

Except as herein provided, all amounts in said account, shall be applied on September first and March first of

each year, or on such other dates as shall be mutually agreed upon by the Trustee in Bankruptcy and the Bank, on the principal of said indebtedness, and shall be considered as cash applied on the quotas of principal as hereinbefore set forth.

The said Declaration of Trust provides that the Bank may pay, purchase, contract or compromise any claims, liens, or incumbrances which in its judgment appear to effect said property or the Trust.

Payment of Claims Against Harbor Property.

Pursuant thereto, it is understood and agreed that the Bank may in its discretion, purchase, settle, or compromise, the claim of any and all third persons claiming an interest in or to the Long Beach Harbor Tract, lying on Channel No. 3 of the Long Beach Harbor, or in or to any proceeds from the sales thereof, and to that end may make all necessary advances to accomplish said purposes, and all such advances shall become a part of the principal of the Bankrupt's indebtedness and shall bear interest at the rate of four per cent. (4%) per annum. It is understood that the claims referred to arise out of a certain contract or agreement known as the Syndicate No. 1 Agreement between F. P. Newport and certain third parties who furnished a portion of the purchase price of said property.

No dividends to General Creditors pending sale of Trust Property.

Since it is contended by the Bank that the security held by it is insufficient to pay the Bankrupt's obligations, and that it will, therefore, probably become an unsecured creditor for a substantial deficiency, it is expressly agreed

that no liquidating dividends shall be paid to the creditors of said Bankrupt Estate until all of the security held by the Bank shall have been sold, and the [75] amount of such deficiency shall be ascertained, to the end that the Bank may participate in such dividends, if any. Provided, however, that nothing herein contained shall be deemed to prevent the Trustee in Bankruptcy from paying such amounts as may be necessary to clear the title to any property not covered by the Trust.

Upon the execution of this agreement by the Trustee in Bankruptcy, all defaults existing shall be deemed to have been waived by the Bank.

Overlapping Quotas to Apply.

Should payments in excess of any one quota of principal be made prior to the due date thereof, such excess payments shall be construed as applying on the next maturing quota of principal.

Notwithstanding anything to the contrary herein provided, it is agreed that, upon any default occurring, and which shall not be cured within sixty (60) days from date of notice as hereinabove provided, no further or additional money in any fund or funds held by the Bank shall be paid out of the Trust by the Bank, but all such sums of money held in any such fund shall be applied by the Bank, at its option, on any indebtedness then due the Bank.

Notwithstanding anything hereinabove to the contrary, the Bank agrees to advance and pay, prior to delinquency, the second installment of taxes for the year 1936-37 on the property held by it in said Trust No. D 7224. All money so advanced shall draw interest at the rate of 4%

per annum, payable quarterly, and if not so paid shall bear like interest as the principal of said advances.

Such advances shall be repaid to the Bank out of any money held by it in the "Special Fund", provided such fund shall have in it at all times sufficient money to assure the payment of the installment of interest falling due on August 1, 1937.

It is agreed, however, that if there is sufficient money in the "Special Fund" to pay said taxes, and to assure the payment of the installment of interest falling due on August 1, 1937, then the Bank shall be under no obligation to advance and pay said taxes.

The terms and conditions of the above-mentioned Declaration of Trust No. D 7224 shall be and they hereby are modified to conform to the terms and conditions hereof.

Other than as modified hereby, the terms and conditions of said Declaration of Trust shall be and they hereby are re-affirmed, ratified and approved. [76]

This agreement shall be executed by the parties hereto, and immediately upon the appointment of a Trustee in Bankruptcy for said Bankrupt, and his due qualification, and upon the Bankruptcy Court approving this agreement, and authorizing him to execute the same as such Trustee, he shall sign and deliver to the Bank an executed copy thereof, and thereupon he shall, as such Trustee, be bound by the terms and conditions thereof.

This Agreement, in so far as the Receiver in Bankruptcy is concerned, is subject to the approval of the Bankruptcy Court.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first hereinabove written.

(Seal) F. P. NEWPORT CORPORATION,
LTD.

By F. P. Newport
President

By J. B. Gribble
Secretary

H. F. Metcalf

As Receiver for F. P. Newport Corporation,
an Alleged Bankrupt

(Seal) SECURITY-FIRST NATIONAL BANK
OF LOS ANGELES

By J. E. Hatch
Vice President

By Randall Boyd
Ass't. Secretary.

I, the Trustee in Bankruptcy for F. P. Newport Corporation, Ltd., a Bankrupt, having been duly appointed, and having duly qualified as such Trustee in Bankruptcy, and being first duly authorized as such Trustee in Bankruptcy, to execute the above agreement, do hereby acknowledge that I have read the above contract, and do hereby approve the same, and do hereby agree to be bound by all of the terms and conditions thereof, as such Trustee in Bankruptcy.

Dated:, 1937.

As Trustee in Bankruptcy for F. P. Newport Corporation, Ltd. [77]

Exhibit "A."

Parcels and Release Prices thereon referred to
in the foregoing Agreement.

Parcel Lots 204-205 Tract

No. 1. No. 250 Release Price \$ 65,000.00

Parcel Lot 3 Verdugo Estates;

No. 2. Plus portions of
 Tract 7146 and
 Blocks 25 and 26,
 Selvas de Verdugo " " \$ 45,000.00

Parcel Remaining portion of

No. 3. Tract, 250, plus
 Block 22 of Selvas
 de Verdugo " " \$ 40,000.00

Parcel All of the remaining

No. 4 subdivided lots in
 the Verdugo area,
 together with Block
 23 & 24 Selvas de
 Verdugo and the
 portion of the Theo-
 dore Verdugo allot-
 ment " " \$130,000.00

Parcel San Fernando Ranch

No. 5 Property—Lot 24,
 Tract 1,000 " " \$ 36,500.00

Parcel Lot 23, Tract

No. 6. 1,000 " " \$ 32,500.00

Parcel Lot 2, Tract 1,000, and

No. 7. Lots 1 and 2, Tract
 1335 " " \$ 55,000.00

Parcel	Lots 4 & 5, Tract			
No.8.	1336	"	"	\$ 45,000.00
Parcel	Lots 6 & 7, Tract			
No. 9.	1336	"	"	\$ 45,000.00
Parcel	Following Miscellaneous Properties—One			
			Release Price \$ 15,000.00	
A.	Unsold lots in La Crescenta Oaks			
B.	Unsold parcels in Richland Farms			
C.	Two houses, at 118 Windsor Road and 2866 Canada Blvd., both in Glendale.			
RB	J. E. Hatch)			
	F. P. Newport)			
	J. B. Gribble)			

[Endorsed]: Filed Dec. 31, 1940, at min. past 10 o'clock A. M. Ernest R. Utley, Referee; Louise Rodgers, Clerk.

[Endorsed]: Filed Nov. 28, 1941. [78]

SUPPLEMENTAL AGREEMENT

This Agreement, made and entered into this 31st day of August, 1937, by and between F. P. Newport Corporation, Ltd., a Delaware Corporation, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bankrupt, H. F. Metcalf, as Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., a Bankrupt, and Security-First National Bank of Los Angeles, a National Banking Association, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bank,

Witnesseth:

Recitals:

Under date of January 12, 1937, the Bankrupt, the Bank, and the then Receiver in Bankruptcy, H. F. Metcalf, entered into an agreement, providing certain terms and conditions under which the properties of the Bankrupt, held by the Bank, as security for the indebtedness of the Bankrupt, might be sold, and providing therein for the reduction in amount of the Bank's indebtedness, and other matters. Reference is hereby made to said agreement for the complete terms and conditions thereof.

The said Trustee in Bankruptcy, upon his appointment, petitioned the Bankruptcy Court to approve the contract and to authorize the same to be signed by him.

The said Bankruptcy Court has approved said contract, and authorized said Trustee to execute the same, conditioned upon certain modifications, hereinafter set forth, being made thereto. All the parties are willing to modify said contract in said particulars, hence this Agreement.

No interest on the sum of \$1,270,451.12, agreed to be accepted by the Bank under the Contract of January 12, 1937, has been paid since February 1, 1937. The Bank has advanced, since said date, to-wit: on the 16th day of April, 1937, the sum of \$9,120.06 for taxes on the property held by it in said [79] Trust No. D 7224, as security for its indebtedness.

The Agreement:

Interest to be added to
principal up to August 1st.

It is agreed that interest on said principal sum of \$1,270,451.12, as provided in said agreement, up to August 1, 1937, together with the sum of \$9,120.06 advanced for taxes on April 16, 1937, with interest thereon at 4% per annum from the date of such advance, to August 1, 1937, shall be added to the said sum of \$1,270,451.12, and thereafter bear the same interest as said sum. It is agreed that the said sum, augmented by said above mentioned amounts, is as of August 1, 1937, the sum of \$1,304,918.77. Said sum shall bear interest at the rate of 4% per annum from August 1, 1937, payable as follows:

Interest payment
Extended

The first installment of said interest thereon shall be paid on or before March 7, 1938. Thereafter said interest shall be paid quarterly from March 7, 1938. If any installment of interest be not so paid, it shall bear like interest as the principal.

Principal payments
extended.

The principal of the Bank's indebtedness, in the agreed amount of \$1,304,918.77, shall be payable on the dates hereinafter specified, instead of on the dates specified in the said contract of January 12, 1937, and shall be paid as follows:

1. \$ 35,000.00 on or before March 7, 1938
2. \$ 65,000.00 on or before September 7, 1938
3. \$250,000.00 on or before September 7, 1939
4. \$150,000.00 on or before March 7, 1940
5. The balance of all indebtedness on or before September 7, 1940.

Repayment of Taxes
from Special Fund.

Such additional sums of money as the Bank, at its election, may advance after August 1, 1937, to pay taxes, assessments and improvement bonds against the property held by it in said Trust D 7224, as security for said indebtedness, as provided in said Declaration of Trust, together with interest thereon from [80] the date of such advance, at the rate of 4% per annum, compounded quarterly, shall be repaid to the Bank out of any money held by it in the "Special Fund" provided such fund shall have in it at all times sufficient money to assure the payment of the installment of interest falling due on March 7, 1938.

Provided the other parties hereto shall have complied with all of the other terms and conditions of said Declaration of Trust D 7224, and the said Agreement of January 12, 1937, as modified by this Agreement, the Bank

agrees that the failure of the Bankrupt or the Trustee in Bankruptcy to pay the installment of taxes for the fiscal year 1937-38, falling due in December of 1937, on the properties held by the Bank in said Trust D 7224, or should the Bank advance the money to pay such taxes, the failure to repay the same out of the "Special Fund" shall not constitute such default as to warrant immediate foreclosure of the said Declaration of Trust, and the failure to pay, or to repay the Bank, if the Bank shall advance them, the January installment of principal and interest on Improvement Bonds, a lien against any of the property held by the Bank in said Trust D 7224, shall not constitute such default as to warrant immediate foreclosure of said Declaration of Trust. And the Bankrupt, or the Trustee in Bankruptcy, shall not be called upon to pay said Tax and bond liens, or to repay the same to the Bank should it advance them, with interest as hereinabove provided, prior to the seventh day of March, 1938.

Receipts from Sales and Rentals
to pass through hands of
Trustee in Bankruptcy.

While the said Declaration of Trust No. 7224, and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust, shall be paid to and be received by the Bank, it is, nevertheless, agreed, pursuant to the Order of said Bankruptcy Court, that such payments shall pass through the hands of the Trustee in Bankruptcy, and be paid to said Trustee in Bankruptcy, and shall be by him forthwith paid over in full to the Bank to be distributed in accordance with the terms of the said Trust No. D 7224, and the [81] agreement of January 12, 1937, as modified hereby.

It is expressly understood and agreed that any such funds so passing through the hands of the Trustee in Bankruptcy, except as hereinafter provided, shall, while in his possession, be impressed by the lien of the Declaration of Trust securing the indebtedness owing to the Bank. Such funds shall be deposited by the Trustee in Bankruptcy in a separate fund, and not commingled with any other funds in the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness, and, except as in said agreement of January 12, 1937, provided, shall not become any part of the general assets of the Bankrupt Estate, nor charged with the payment of any of the expenses of administering said Bankrupt Estate, and nothing herein contained shall prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee.

No Modification of
\$7,000 Income Provision.

Nothing herein contained, however, shall modify or change the provisions of said contract of January 12, 1937, under the heading of temporary collection of rents by the Trustee in Bankruptcy ~~by the terms of which certain rentals up to a maximum of \$7,000.00 for a limited period, are to be retained by the Trustee in Bankruptcy.~~

As provided for in said Agreement of January 12, 1937, it is agreed that all sales or leases of property shall be made by the Bank and the Trustee in Bankruptcy, subject to the approval of the Bankruptcy Court.

Referring to the second paragraph, on page seven of said agreement of January 12, 1937, entitled "Release Prices Credited Only on Principal", it is understood and agreed that the Trustee in Bankruptcy shall not be required, except by an order of this court, to make any payments to the Bank out of funds derived from properties not held by the Bank under its said Trust.

Other than as expressly modified by the terms of this [82] Agreement, the said Agreement of January 12, 1937, shall remain in full force and effect, and is hereby ratified and confirmed.

Contract as
Modified Affirmed

Hubert F. Laugharn was appointed Trustee in Bankruptcy by the Referee in Bankruptcy, and the District Judge made an order vacating said appointment, and adjudging that H. F. Metcalf had been elected Trustee, from which latter order an appeal to the United States Circuit Court of Appeals of the Ninth Circuit is now pending. Said Hubert F. Laugharn petitioned the Court for instructions as to whether or not he should sign the said contract and be bound thereby in the event of a decision confirming his appointment as Trustee and reversing the order of the District Judge, and the Court has instructed him to so sign and be so bound.

Therefore, said Hubert F. Laugharn, by his signing this agreement, becomes bound by all of the terms and conditions thereof, should he become Trustee of said Bankrupt Estate.

This contract shall be binding upon the parties hereto, their successors and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals, the day and year first hereinabove written.

(Corporate Seal)

F. P. NEWPORT CORPORATION, LTD.

By F. P. Newport
President

By J. B. Gribble
Secretary

H. F. Metcalf

Trustee in Bankruptcy for the Creditors
of F. P. Newport Corporation, Ltd., a
corporation, Bankrupt.

(Seal)

SECURITY-FIRST NATIONAL BANK
OF LOS ANGELES

By V. O. Wroolie
Vice President

By Randall Boyd
Assistant Secretary

Hubert F. Laugharn

[Endorsed]: Filed Dec. 31, 1940, at Min. past
10 o'clock A. M. Ernest R. Utley, Referee; Louise
Rodgers, Clerk.

[Endorsed]: Filed Nov. 28, 1941. [83]

Exhibit "B".

[Title of District Court and Cause.]

STIPULATION RE MODIFICATION OF CONTRACT OR AGREEMENT OF JANUARY 12, 1937.

It Is Hereby Stipulated and Agreed by and between the undersigned that that certain contract or agreement dated the 12th day of January, 1937, made and entered into by and between F. P. Newport Corporation, Ltd., a Delaware corporation, bankrupt, H. F. Metcalf as Receiver for said F. P. Newport Corporation, Ltd., and Security-First National Bank of Los Angeles, a national banking association, (copy of which contract or agreement is attached to, marked Exhibit "A" and made part of the Findings and Order made and signed by the Honorable Ernest R. Utley, Referee in Bankruptcy herein, on the 13th day of August, 1937), may be and is hereby modified in the following respects and particulars only, to wit:

- (1) That certain paragraph appearing on page 6 of said contract or agreement (pages 6 and 7 of said Exhibit "A"), reading as follows:

All properties not described in said Exhibit "A" shall be retained in said Trust and be leased or sold on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy, and shall be subject to the approval of the Bankruptcy Court.

Is Hereby Changed, Altered and Modified to Read as
Follows:

All properties not described in said Exhibit "A" shall be retained in said Trust and be leased or sold on terms and conditions subject to the approval of the Bankruptcy Court. For the purposes of this agreement it is understood that no release prices are fixed on properties not described in said Exhibit "A".

(2) That certain paragraph appearing on page 6 of said contract or agreement (page 7 of said Exhibit "A") reading as follows: [84]

Any and all sales of said real property described in Exhibit "A" shall be on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy and shall be subject to the approval of the Bankruptcy Court.

Is Hereby Changed, Altered and Modified to Read as Follows:

Any and all sales of said real property described in Exhibit "A" shall be on terms and conditions satisfactory to and shall be subject to the approval of the Bankruptcy Court.

Dated this 14th day of October, 1937.

F. P. NEWPORT CORPORATION, LTD.
(Corporate Seal) By F. P. NEWPORT
President
By J. B. GRIBBLE
Secretary

SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES

By C. W. CRAIG

Vice President

(Corporate Seal)

By RANDALL BOYD

Assistant Secretary

H. F. METCALF

As Trustee in Bankruptcy of F. P. Newport Corporation,
Ltd.

HUBERT F. LAUGHARN

L. M. CAHILL

Counsel for F. P. Newport Corporation, Ltd.

W. C. SHELTON, GEORGE BURCH, JR. AND
EARL E. MOSS

By W. C. SHELTON

Counsel for said Security-First National Bank of Los
Angeles

ROBERT B. POWELL

Counsel for Hubert F. Laugharn

BAILIE, TURNER & LAKE

By NORMAN A. BAILIE

Counsel for H. F. Metcalf, Trustee.

Approved this 14th day of October, 1937.

PAUL J. McCORMICK

United States District Judge.

Endorsed]: Filed Dec. 31, 1940 at min. past 10
o'clock a. m. Ernest R. Utley, Referee; Louise Rodgers,
Clerk.

[Endorsed]: Filed Nov. 28, 1941. [85]

[Title of District Court and Cause.]

STIPULATION RE MODIFICATION OF SUPPLEMENTAL AGREEMENT DATED AUGUST 31, 1937.

It Is Hereby Stipulated and Agreed by and between the undersigned that that certain "Supplemental Agreement" dated the 31st day of August, 1937, and made and entered into by and between F. P. Newport Corporation, Ltd., a Delaware Corporation, Bankrupt, H. F. Metcalf, as Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., a Bankrupt, and Security-First National Bank of Los Angeles, a National Banking Association, (copy of which "Supplemental Agreement" is attached to, marked Exhibit "C" and made a part of the Findings and Order made and signed by the Honorable Ernest R. Utley, Referee in Bankruptcy herein, on the 13th day of August, 1937), may be and is hereby modified in the following respects and particulars only, to wit:

Those certain paragraphs appearing on pages 3 and 4 of said "Supplemental Agreement" and reading as follows:

"While the said Declaration of Trust No. 7224, and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust, shall be paid to and be received by the Bank, it is, nevertheless, agreed, pursuant to the Order of said Bankruptcy Court, that such payments shall pass through the hands of the Trustee in Bankruptcy, and be paid to said Trustee in Bankruptcy, and shall be by him forthwith paid over in full to the Bank to be distributed in accordance with the terms of the said Trust No. D 7224, and the agreement of January 12, 1937, as modified hereby.

"It is expressly understood and agreed that any such funds so passing through the hands of the Trustee in Bankruptcy, except as hereinafter provided, shall, while in his possession, be impressed by the lien of the Declaration of Trust securing the indebtedness owing to the Bank. Such funds shall be deposited by the Trustee [86] in Bankruptcy in a separate fund, and not commingled with any other funds in the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness, and, except as in said agreement of January 12, 1937, provided, shall not become any part of the general assets of the Bankrupt Estate, nor charged with the payment of any of the expenses of administering said Bankrupt Estate, and nothing herein contained shall prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee."

Are Hereby Changed, Altered and Modified to Read as Follows:

"While the said Declaration of Trust No. D 7224 and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring that all bankruptcy funds be accounted for by the Trustee and be disbursed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D 7224 and the agreement of January 12, 1937, as modified hereby.

"Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds or money so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust shall, until the indebtedness due the Bank has been paid and except as hereinafter provided, be, while in his possession, impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate. No provision of said agreement of January 12, 1937, or this supplement thereto is made or entered into, directly or indirectly, for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorney of any party in interest in this bankruptcy proceeding, for services rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to anyone whomsoever from the assets of this Bankrupt Estate, is, in accordance with the law, left entirely to the determination of the court having jurisdiction of this bankruptcy proceeding, unaffected by any provision term or condition, express or implied,

of said contract of January 12, 1937, or of this supplement thereto." [87]

Dated this day of October, 1937.

F. P. NEWPORT CORPORATION, LTD.

(Corporate Seal) By F. P. NEWPORT

President

By J. B. GRIBBLE

Secretary

SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES

By C. W. CRAIG

Vice President

(Corporate Seal) By R. T. ADAMS

Assistant Secretary

H. F. METCALF

As Trustee in Bankruptcy of F. P. Newport Corporation,
Ltd.

HUBERT F. LAUGHARN

L. M. CAHILL

Counsel for F. P. Newport Corporation, Ltd.

W. C. SHELTON, GEORGE BURCH, JR. AND
EARL E. MOSS

By W. C. SHELTON

Counsel for Security-First National Bank of Los
Angeles

ROBERT B. POWELL

Counsel for Hubert F. Laugharn

BAILIE, TURNER & LAKE

By NORMAN A. BAILIE

Counsel for H. F. Metcalf, Trustee in Bankruptcy.

Approved this 29th day of October, 1937.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Oct. 29, 1937 [88]

[TRUSTEE'S EXHIBIT C—BY REFERENCE]

OIL AND GAS LEASE.

This indenture, Made and entered into this 14th day of January, 1938, by and between Security-First National Bank of Los Angeles, a national banking association, as Trustee under its Trust No. D-7224, F. P. Newport Corporation, Ltd., a corporation, Bankrupt, and the Trustee in Bankruptcy of said F. P. Newport Corporation, Ltd., Bankrupt, Parties of the First Part and Lessors, and Universal Consolidated Oil Company, a California corporation, Party of the Second Part and Lessee,

Witnesseth:

Granting Clause.

That for and in consideration of \$10.00, lawful money of the United States of America, to the Lessors in hand paid, and of other valuable consideration, the receipt of which is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained by the Lessee to be kept and performed, the Lessors have leased, let and demised, and by these presents do lease, let and demise unto the Lessee, its successors and assigns, those certain lots, pieces or parcels of real property in the Rancho Los Cerritos, situate in the City of Long Beach, County of Los Angeles, State of California, more particularly described as follows:

Parcel 1: Beginning at the most Southwesterly corner of the land described in the [89] deed to the Title Insurance and Trust Company, recorded in Book 5577 Page 105 of Deeds, Records of said County, in the Northwesterly line of Channel No. 3, Long Beach Harbor; thence along said Northwest-
erly line South 64° 42' 30" West 250 feet; thence

North $19^{\circ} 42' 30''$ East 738.08 feet; thence North $64^{\circ} 42' 30''$ East 250 feet to the most Northwesterly corner of the land described in said deed to the Title Insurance and Trust Company; thence along the Northwesterly line of said land so described, South $19^{\circ} 42' 30''$ West 738.08 feet to the point of beginning.

Parcel 2. Beginning at the most Southeasterly corner of the land described in the above mentioned deed to the Title Insurance and Trust Company, in the Northwesterly line of Channel No. 3 of Long Beach Harbor; thence along the Southeasterly line of the land described in said deed North $19^{\circ} 42' 30''$ East, 738.08 feet; thence North $64^{\circ} 42' 30''$ East 500 feet; thence South $19^{\circ} 42' 30''$ West 738.08 feet to a point in said Northwesterly line of Channel No. 3; thence along said Northwesterly line South $64^{\circ} 42' 30''$ West 500 feet to the point of beginning.

Note: In Book 1 Page 10 of the County Recorder's Assessment Maps, is the record of a map filed February 9th, 1917, made by the City Engineer of the City of Long Beach for local assessment purposes only, upon which map [90] the above described property is designated as Lots 18, 20 and 21.

To have and to hold the same for the purposes and term hereinafter provided therefor, subject to any valid Municipal, State and/or Federal rights, if any there be and subject also to conditions, reservations, restrictions, rights and rights of way, if any there be, of record, and upon the following covenants, terms and conditions:

Duration of Lease.

1. Unless sooner terminated as elsewhere herein provided, this lease shall continue for a period of 30 days from and after the date of the delivery hereof, and so long thereafter as actual drilling on said premises is being diligently conducted or deferred under provisions herein elsewhere contained, and should production of one or more of the products specifically mentioned in the next succeeding paragraph result from said drilling operations, then this lease, unless sooner terminated as elsewhere herein provided, shall remain in full force so long thereafter as one or more of said products are produced from said demised premises in commercially paying quantities, not to exceed 25 years from date hereof.

Purpose of Lease and Rights of Lessee.

2. The Lessee shall have the sole and exclusive right, (unless otherwise expressly provided herein to the contrary), of prospecting the demised premises and drilling for, producing, extracting, treating, removing and [91] marketing oil, gas, natural gasoline and other hydrocarbon substances therefrom, and to establish and maintain on said premises such tanks, boilers, houses, engines and other apparatus and equipment, power lines, pipe lines, roads and other appurtenances as may be necessary or convenient in the production, treatment, storage and/or transportation of any and all said products from and on said property. The Lessee shall have the right during the life of this lease to drill for and develop such water on any part of the demised premises as it may require in its operations hereunder, provided the Lessors possess the right so to do; provided, however, that it is understood by the Lessee that a portion of said demised premises is now being occupied by John Harvey, doing business un-

der the firm name and style of De Luxe Water Taxi Co., under one or more leases, which said lease or leases, held by said John Harvey, the Lessors shall be under no obligation to terminate until such time as the Lessee has drilled and completed at least one well on said property which produces oil and/or gas in commercially paying quantities, and until such occupancy by the said John Harvey, his successors in interest or assigns, shall substantially interfere with the operations of the Lessee hereunder. It is further understood by the Lessee and the Lessors warrant that the portions of said premises so held by said John Harvey are by him held under a month to month lease or leases, which are subject to termination upon the notice provided by law therefor. [92]

Drilling Requirements.

3. The Lessee agrees to commence the actual drilling of a well on the demised premises within 30 days after date of the delivery hereof, and to diligently prosecute the same until oil and/or gas be found in commercially paying quantities, or to a depth at which further drilling would, in the opinion of a competent and impartial geologist, be unprofitable; provided, however, that the Lessee shall drill said first well to and so far into the "terminal" sand, zone or horizon as may reasonably be expected to secure therefrom the most prolific production of oil. If said first well or any subsequent well prior to completion of a paying well be abandoned for mechanical or other reasons, this lease shall remain in force and effect if the actual drilling of a new well is begun within 30 days from the date of such abandonment, and the drilling thereof is diligently prosecuted to completion or abandonment. If prior to the completion of said first well there shall have been completed within 330 feet of the exterior boundary line of any of the demised premises a well which pro-

duces oil and/or gas in commercially paying quantities, then and in such event the Lessee agrees to promptly commence the drilling of a second well and to diligently prosecute the drilling thereof concurrently with the drilling of said first well, until such second well shall have been completed as a commercial producer or until it shall have been drilled to a depth at which further drilling would, in the opinion of a competent and impartial geologist, be unprofitable. If at the time of the abandonment of any well the Lessee is already engaged in the drilling of one or more other wells upon the demised premises, the foregoing requirement for the commencement of a new well within 30 days after the date of such abandonment shall not apply so long as the drilling of any such additional well or wells shall be in good faith diligently continued.

Subsequent Wells.

It is further understood and agreed that subject to any rules and regulations of any Federal, State, Municipal or other governmental agency or other matters or conditions beyond the control of the Lessee, one well shall be drilled to completion and production for each one acre of land covered hereby as follows: Such wells, (unless the Lessee shall elect or be required hereunder to accelerate its drilling operations), shall be drilled in succession; the drilling of each successive well shall be commenced at an interval of not more than 30 days after the next preceding well has been completed and placed on production. Such drilling of said wells shall continue until a number equal to one well for each acre of land covered hereby has been drilled and completed as a commercial producer.

Full Development Clause.

Unless excused from so doing under Paragraph 5 hereof, (anything herein elsewhere to the contrary notwithstanding), the Lessee agrees, while operating [94] hereunder, to properly produce all available oil, gas and other hydrocarbon substances from the demised premises, (or any portion thereof held by the Lessee), and to properly exploit, develop and protect the minerals and mineral rights in the demised premises, (or in any portion thereof held by the Lessee), subject, in each instance, to legal restrictions and to any regulations imposed by governmental authority or any other matters over which the Lessee has no control. For a failure of the Lessee, when reasonably necessary and proper so to do, to develop any known commercially profitable zone or stratum the Lessors may forfeit the right of the Lessee to develop or produce any such zone or stratum or any zone or stratum below any depth from which the Lessee may then be producing on said premises, or the Lessors may pursue any other remedy given them by law hereunder.

No Slant Drilling.

The Lessee also agrees to drill all wells within an area representing the superficial area of the demised premises from the surface thereof down to the depth of said wells, and not to trespass upon the lands of adjoining or neighboring owners, and to make the necessary surveys to carry out the provisions of this clause, which surveys shall be open to the inspection of the Lessors and their authorized representatives; and the Lessee agrees to indemnify and protect the Lessors and each of them against any and all claims and refunds for all oil, gas and other hydrocarbon substances se- [95] cured and produced from any well drilled hereunder not extending down wholly beneath said superficial area.

Limitation on Rights to Deepen, etc.

4. The Lessee shall have the right at all times during the continuance of this lease to operate, deepen, (if the right to deepen has not been forfeited), redrill and maintain all producing oil and/or gas wells upon the demised premises: provided, however, that the Lessee shall not, without the written consent of the Lessors, have the right to deepen any existing well or to drill any new well after a forfeiture has occurred because of the failure of the Lessee to fulfill any of the drilling obligations hereunder, but this proviso shall apply only to property affected by such forfeiture and to the wells thereon situate or intended to be drilled thereon.

Suspension of Operations.

5. Drilling and/or producing and/or repairing operations may be delayed, suspended or curtailed on the demised premises only in the event that they are prevented by the elements, accidents, strikes, lockouts, delays in transportation or interference by Municipal, County, State or Federal action, or the action of other governmental officers or bodies or other causes beyond the reasonable control of the Lessee, or when there is no market for the oil; provided, however, that the failure of the Lessee to obtain any permit or permits legally required [96] as a condition precedent to the drilling of any such well or wells shall not operate to delay, suspend or curtail any such operation where the failure to obtain any such permit is the result of the neglect of the Lessee to in good faith promptly apply therefor, or where any refusal to grant such a permit is based upon any prior acts or omissions of the Lessee; and, provided, further, that in no event shall any failure, from whatever source, to obtain any such necessary permit or permits extend the time for the

commencement of the actual drilling of the first well beyond 120 days from the date hereof.

Conservation Agreements.

The Lessee, if and when legally required so to do, is hereby authorized to enter into conservation and curtailment agreements with other operators for the purpose of preventing waste or for the conservation of oil and/or gas; provided that any such legally required agreed curtailment, unless otherwise provided by law, shall be at no greater pro rata percentage per well or location on demised premises than that on offset acreage where offset wells are producing or drilling; provided, further, however, that no such legally required agreement, unless provision therefor be made mandatory by law, shall require or permit the Lessee to suspend or curtail any drilling or production operations on any well which offsets any well on adjacent premises drilled or being drilled within 330 feet of the boundary line of the demised premises, where the drilling [97] or production of the well so offset is not likewise being suspended or curtailed.

Free Use of Fuel and Water.

6. The Lessee shall be entitled to use, without payment of royalty, so much of the water, (if the right to develop and produce water be available to the Lessee hereunder), oil and/or gas developed and produced by the Lessee on the demised premises, as may be required by the Lessee in the operation of said premises.

Royalty on Oil.

7. The Lessee shall pay said Trustee in Bankruptcy, his successors or assigns, on or before the 20th day of each month, as royalty and rental, a sum equal to thirty-five per cent (35%) of the full market price on the demised

premises of all oil produced and saved by it from said premises during the last preceding calendar month, or (as hereinafter provided) in lieu thereof, thirty-five per cent (35%) of the oil so produced and saved. Said market price shall be the full market price contracted for by the Lessee and shall not be less than the available posted market price offered by the major oil purchasing companies for oil of like gravity and quality on the premises where produced in the district in which the demised premises are located on the date of delivery of the oil from the Lessee's gauge tanks, unless clean oil be unsaleable at such price, in which event the Lessee shall so notify Lessors of such condition, and pending the [98] continuance of such condition, the Lessee shall sell such clean oil at the best available price obtainable therefor, unless the Lessors elect to take in kind, and the price contracted therefor by the Lessee shall be the price used in settlement with the Lessors on account of the oil so marketed.

Dehydration.

In the event the oil requires treatment or dehydration to render it, marketable as clean oil, the Lessee shall so treat or dehydrate the same or cause the same to be treated or dehydrated, and the Lessee is hereby authorized to deduct from the amount due the Lessors a sum equal to thirty-five per cent (35%) of the actual cost of transportation to or from the treating plant, if same be located off of the demised premises, and thirty-five per cent (35%) of the actual cost of such treating or dehydrating, exclusive of any plant or overhead cost, not to exceed four cents per barrel for such treating and/or dehydrating.

Royalty in Kind.

At Lessors' option, exercised not oftener than four times in any one calendar year, upon thirty days' previous written notice, Lessee shall, until notified in writing to the contrary, deliver into Lessors' tanks on the demised premises, free of cost, Lessors' royalty oil. No royalty shall be due the Lessors for or on account of any oil lost through evaporation, leakage or otherwise, not due to the negligence of the Lessee, prior to the [99] marketing of the same or delivery to the Lessors, if royalty oil is being taken in kind.

Royalty on Gas.

8. The Lessee shall be under no obligation to sell or store gas or water, nor to manufacture gasoline or other products from natural gas; provided, however, that if the Lessee can contract the manufacture of gasoline and/or other products from natural gas on a commercially profitable basis, the Lessee will be required so to do, unless the Lessee elects to manufacture the same itself. If any gas or any water is sold, the Lessee shall pay to the said Trustee in Bankruptcy, his successors or assigns, a sum equal to thirty-five per cent (35%) of the proceeds of the sale of such gas or water, after deducting any actual cost (exclusive of overhead) of transporting and selling the same. If casinghead gasoline or other products be manufactured or extracted on the premises or elsewhere by the Lessee or by others under a contract or lease on a royalty basis from gas produced from any well or wells on the demised premises, such products shall be marketed according to the prevailing usage and custom of marketing such products and at the best price obtainable therefor consistent with sound business principles, and the Lessee shall deduct from the

gross royalty or proceeds received by the Lessee from the sale of such products any actual cost (exclusive of overhead) to the Lessee of extracting, (if it extract such products), transporting and selling the same, and shall pay to the said Trustee [100] in Bankruptcy, his successors or assigns, a sum equal to thirty-five per cent (35%) of the remainder of such royalty or proceeds.

Taxes on Personality.

9. The Lessee shall well and truly pay before delinquency all taxes and assessments levied or assessed against the improvements, machinery, equipment or other property, real or personal, placed or caused to be placed by it upon the demised premises, including all oil stored thereon, exclusive of Lessors' royalty oil.

Other Taxes.

If the assessed value of the demised premises, (exclusive of the improvements thereon), be hereafter increased over the assessed valuation as fixed for the fiscal year 1936-37, by reason of the discovery of oil and/or gas thereon, the Lessee shall pay sixty-five per cent (65%) of all taxes levied or assessed upon such increase above the assessed valuation for said fiscal year 1936-37, and the Lessors shall pay the balance of the taxes and/or assessments on said lands; provided, however, that if under the present laws or any laws which may be hereafter enacted, this lease and/or the leasehold estate created hereby and/or the oil, gas, minerals or mineral rights in said premises are assessed separately and apart from said land, under any name or designation whatsoever, and/or if any tax be levied or assessed which is based upon the quantity of the production of oil and/or gas from said premises, whether assessed or levied to or against the Lessors or Lessee, or if any severance

charge be levied, assessed or made, then sixty-five per cent (65%) of the charges and/or taxes so levied, assessed or made shall be paid by the Lessee and thirty-five per cent (35%) thereof shall be paid by the Lessors.

Failure of Lessors to Pay Taxes.

Upon the failure of the Lessors to pay their proportion of any of said taxes, the Lessee is hereby authorized to pay the same, and the Lessors agree to repay the Lessee the amount so paid, with interest thereon at the rate of 7% per annum from the date of such payment by the Lessee until so repaid.

Rights if Lessee Pays Lessors' Taxes.

In case of any such payment by the Lessee it may deliver to the Lessors an itemized statement of all taxes so paid for the Lessors, in which event said Lessee may deduct from the next royalty or royalties payable hereunder an amount sufficient to reimburse the Lessee for the amount so paid.

Rights if Lessors Pay Lessee's Taxes.

Upon the failure of the Lessee to pay its proportion of said taxes, the Lessors or any one or more of them may advance the same, and the Lessee agrees to repay same to the Lessor or Lessors so making said advancement, together with interest [102] thereon at the rate of 7% per annum from the date of such advancement until repaid.

The obligations of the Lessors under this Paragraph 9 shall not be binding upon any trustee lessor except to the extent that such trustee lessor may have in his possession monies sufficient to meet such obligations which may be available for that purpose, nor shall any such

obligations be binding upon any such trustee lessor in his or its individual capacity.

Royalty, Where and How Paid.

10. All payments of rentals and royalties due hereunder shall be made by the Lessee's check, accompanied by a statement showing in detail how the amount was arrived at, mailed, postage prepaid, or delivered personally on or before the day such payment is due, to said Trustee in Bankruptcy at the address of such Trustee, at Los Angeles, California, until further notified by said Trustee in Bankruptcy. No change in the ownership of said demised premises or in any part thereof or in the rentals or royalties or any part thereof shall affect or bind the Lessee until the purchaser thereof shall exhibit to the Lessee the original instrument of conveyance and furnish to the Lessee a duly certified copy thereof. Such evidence of ownership must be supplied at least thirty days before the same is to take effect, (unless otherwise consented to by the Lessee), otherwise payment of rentals to [103] the purchaser's predecessor in title shall bind such purchaser.

Paying Quantities.

11. The term "paying quantities" and similar expressions wherever used herein are hereby defined to mean such quantities of oil and/or gas as will justify the Lessee in continuing to operate the well or wells from which the same may be produced.

Manner of Operations and Records Thereof.

12. The Lessee shall carry on all operations hereunder diligently, with adequate equipment, and in a careful workmanlike manner, and in accordance with all valid laws, rules and regulations enacted by any au-

thority having jurisdiction over such operations, and shall keep full and true records of the operations and productions, sales and shipments of products from said property and all other records necessary and proper to enable it to, (and it shall), fully and properly account hereunder, and all such records and the operations on said demised premises shall be at all reasonable times open to the inspection of the Lessors or any one or more of them, (including all information filed with the State Oil and Gas Supervisor by the Lessee, its successors or assigns, consent to the inspection of which is hereby expressly granted by the Lessee). Whenever requested by the Lessors or by any one or more of them in writing, the Lessee [104] shall furnish to them a copy of the log of any well drilled on said demised premises.

Basis of Accounting by Lessee.

All accountings by the Lessee to the Lessors for royalty and rental from oil produced hereunder shall be based upon tests made of the oil after it has been cleaned and dehydrated, and which tests must be by some approved modern method commonly in use at the time the tests, respectively, are made, and which said tests and the manner of making the same must be such as to obtain the most accurate results reasonably obtainable, and it shall be the duty of the Lessee in marketing such oil to observe and enforce these requirements; and, in contracting for the processing of natural gas, it shall be the duty of the Lessee to see that it gets a like or greater percentage of other products (or of the proceeds therefrom) extracted and saved from the natural gas as it does of the gasoline (or of the proceeds therefrom) extracted and saved from the natural gas.

Use of Premises by Lessors.

13. The Lessors and each of them shall have the right to gauge all production hereunder and to use the surface of the demised premises, (where they have the right now to use the same, respectively), for any purpose or purposes not inconsistent with the rights of the Lessee hereunder, and to such an extent as will not unreasonably interfere with such rights of the Lessee hereunder, including the right [105] to develop or to cause to be developed any sand or zone in the demised premises, the right to develop which has been lost by the Lessee. The Lessee agrees to conduct its operations hereunder so as to interfere as little with such use by the Lessors, respectively, as is consistent with the economical operation of the property for the development and production of oil, gas and other hydrocarbon substances therefrom and thereon.

Removal of Equipment.

14. The Lessee shall have, within the time elsewhere herein provided therefor, the right to remove any houses, tanks, pipe lines, structures, casing or other equipment, appurtenances or appliances of any kind brought by it upon the said demised premises, whether affixed to the soil or not; provided, however, that in case of the abandonment, for reasons other than mechanical difficulties, of any producing oil and/or gas or water well in which the Lessee has landed casing, if the owner or owners of the demised premises on which any such well shall be located shall desire to retain the same, he or they shall notify the Lessee in writing to that effect within ten days after receiving written notice from the Lessee of its intention to abandon and remove casing, and thereupon the Lessee shall leave in the well such of said casing

as any such owner or owners shall require, and such owner or owners shall forthwith pay to the Lessee fifty per cent of the cost to the Lessee of such casing delivered on the ground. [106]

Forfeiture.

15. In the event of any breach of any of the covenants, terms or conditions of this lease by the Lessee, other than one of those mentioned in Paragraph 29 hereof, and the failure of the Lessee to commence in good faith to remedy the same within 30 days after written notice from the owner or owners of the demised premises so to do, or if the Lessee shall fail to diligently prosecute its efforts until such default has been fully remedied, then, at the option of such owner or owners, this lease shall forthwith cease and determine, and all rights of the Lessee herein and hereunder shall be at an end; provided, however, that notwithstanding any such forfeiture of this lease for any cause other than one of those mentioned in subparagraphs (a) and (b) of Paragraph 29 hereof the Lessee shall have the right to retain any and all wells then being drilled or which may then be producing oil and/or gas in paying quantities, together with the aforesaid easements and appurtenances of said wells, in so far as reasonably necessary for the operation thereof, and sufficient land surrounding each well for the operation thereof. The land so retained shall be subject to all of the terms and conditions of this lease.

Litigation as to Royalty—Delinquent Liens.

16. Should suit be brought involving the ownership of any royalties accruing hereunder or the validity of this lease or the foreclosure of a lien [107] or charge against the fee of any lot, piece or parcel of land included in the demised premises, or said rents and royalties, the Lessee

shall not be relieved of the obligation to make any such payment of rents and royalties, but such payments shall be made to a bank to be selected by the Lessors, their successors in interest or assigns; and as to the amount in controversy only, shall be held in escrow by such bank pending the determination of such suit, and shall upon the final determination thereof be paid over to the party or parties who shall be determined to be entitled thereto.

Rezoning and Permits.

17. That as to all or any part of the lands covered by and subject to the terms of this lease which may at the date hereof or which may hereafter require a permit or zoning to permit any authorized operation of the Lessee hereunder, the Lessors of the lands so requiring such permit or rezoning and the Lessee agree, but without expense to the Lessors, to sign and to cause to be delivered to the legally constituted authorities of the proper Municipal or other political subdivision the necessary petitions, documents, maps and/or other requisite papers requesting, soliciting and praying for such permit or the rezoning of such lands so as to permit such operations thereon; provided, however, that nothing herein contained shall obligate the Lessors or any one or more of them to sign any petition, document, map or other paper where the signing thereof would [108] have the effect of obligating such signer to pay any money or moneys or to perform any other act which might affect such signer financially, or which might operate as a transfer or relinquishment of any right or interest of such signer hereunder, or as a transfer or conveyance of any interest of such signer in said property or in any products therefrom.

Lessee Liable for Damages and Negligence.

18. The Lessee shall during the term of this lease be responsible to the Lessors, respectively, and to all other persons or corporations for all damages caused by its negligence and/or by its operations hereunder, and shall indemnify and defend the Lessors and each of them against any and all such damages or claim therefor on the part of third persons; and, if the Lessee shall engage in any operation or operations hereunder which may have the effect of placing a legal liability upon the Lessors, the Lessee shall, at its own cost and expense, take out and maintain all insurance reasonably necessary to protect and indemnify the Lessors and each of them hereunder, and shall furnish to the Lessors appropriate evidence that the Lessee has complied with the requirement to take out and maintain such insurance.

Notices.

19. Any notice from the Lessors or any of them to the Lessee may be given by serving such notice personally upon the Lessee or by sending the same by registered mail addressed to the Lessee at 417 [109] South Hill Street, Los Angeles, California, and any notice from the Lessee to the Lessors or to any one or more of them may be given by sending the same by registered mail addressed to said Lessors at their respective places of business in the City of Los Angeles, California. Any party hereto may at any time by written notice to the others change the address to which notices shall thereafter be sent by the person or persons desiring to send such notice.

Lessee to Keep Premises Free of Liens.

20. All materials furnished or work done on said demised premises by the Lessee shall be at the Lessee's

sole cost and expense, and the Lessee agrees to protect said demised premises and each piece and parcel thereof and the respective Lessors from all claims of contractors, laborers and materialmen, hereby consenting that the Lessors may post and keep posted on the demised premises such notices as may be desired in order to protect said lands and premises against mechanics' or other liens resulting from the operations of the Lessee hereunder.

Surrender of Premises.

21. Upon the expiration of this lease or its sooner termination in whole or in part, the Lessee shall surrender the possession of the demised premises or the affected portion thereof to the Lessors, and shall deliver or cause to be delivered to the Lessors a good and sufficient reconveyance thereof. Within 30 days after such expiration or termina- [110] tion, the Lessee shall, (subject to the rights and privileges granted the Lessee and the Lessors, respectively, hereunder), remove from such premises as to which this lease is so terminated, all of its rigs, machinery and other property, and shall fill all sump holes and other excavations made by it.

Right to Quitclaim.

At any time after the Lessee has drilled the first or any subsequent well upon said demised premises to the depth required by Paragraph 3 hereof, if such well or wells be incapable of producing in paying quantities, the Lessee may quitclaim the demised premises, or the parcel thereof upon which such well may have been drilled to the Lessors, and thereafter the obligations of the Lessee hereunder shall cease as to the premises or parcel so quitclaimed: provided further, however, that the quitclaiming of either of said parcels without the other shall

have the same effect and be accompanied by the same results as if the same had been forfeited under Paragraph 15 hereof, but the quitclaiming of the entire premises, whether accomplished by one or two deeds and whether accomplished at the same or different times, shall operate to deprive the Lessee of all of its rights hereunder, except the right to remove its equipment as provided in Paragraph 14 hereof, subject to the rights of the owner or owners as in said last mentioned paragraph set forth.

Arbitration by Geologists.

The geologist mentioned in said Paragraph 3 hereof shall be a geologist mutually agreed upon in [111] writing by the parties hereto. If they cannot so agree the Lessors shall select one geologist, the Lessee another, and if the two so selected cannot agree, they are to select a third, whose opinion, when expressed in writing, shall be binding on all parties hereto.

Assignment.

22. It is agreed by and between all of the parties hereto that the Lessee shall have no right to (and it covenants that it will not), without the written consent of the Lessors first had and obtained, assign or transfer this lease or any interest therein or thereunder, nor sublet the demised premises or any part thereof; provided, however, that nothing in this paragraph contained shall operate to deprive the Lessee of the absolute right to assign or transfer this lease in its entirety in the event (a) that the Lessee consolidates with another corporation, or (b) in the event it reorganizes, or (c) in the event it make a bonafide transfer of a majority of its assets; but any such assignment or transfer must conform to the requirements hereinafter in this paragraph contained. It

is hereby further agreed that in the event this Lease shall be assigned by the Lessee with the consent of the Lessors as to a part or as to parts of the demised premises, and the assignee or assignees of such part or parts shall default in the performance of any covenant of this lease as applied to such portion so assigned, such default shall not operate to defeat or affect this lease in so far [112] as it covers the part of the demised premises retained by the said Lessee or any assignee thereof upon which there is no default. Any transfer or assignment of this lease or of any interest herein or hereunder or of the leasehold estate or any part thereof or of any interest therein, or the subleasing of said demised premises or of any part thereof, or any agreement for the joint development or operation of said demised premises or any part thereof, whether made by the Lessee or by anyone who may have succeeded to all or some of the rights of the Lessee hereunder, shall operate at the option of the Lessors to entitle the Lessors to terminate this lease and to re-enter the premises, unless such assignment, transfer, sublease or agreement is in writing and contains (1) the full and correct name and residence address of the assignee, transferee, sublessee or joint operator, and (2) a covenant on the part of such assignee, transferee, sublessee or joint operator to the effect that such assignee, transferee, sublessee or joint operator is bound by all rights granted by the Lessee to the Lessors herein and assumes for the benefit of the Lessors and will faithfully keep, observe and perform each and every covenant, term and condition in this lease contained on the part of the Lessee in the future to be observed, kept or performed, in so far as the same may apply or relate to any interest, property or estate acquired by said assignee, transferee, sublessee or joint operator under any such assignment.

transfer, sublease or agreement; and unless said instrument or a duplicate thereof be subscribed by said assignee, transferee, sublessee or joint operator and be duly acknowledged by him and certified so as to entitle the same to recordation, and be delivered to said Lessors in person or by United States registered mail in the manner herein required for the service of any notice upon the Lessors, within ten days next following the delivery of any such assignment, transfer, sublease or agreement. Such name, address, assumption and covenant may at the option of the assignee, transferee, sublessee or joint operator be contained in a separate instrument to be executed concurrently with such assignment, transfer, sublease or agreement, acknowledged, certified and delivered to said Lessors within the time and in the manner above provided. If such assignment, transfer, sublease or agreement shall pertain to only a portion of the leasehold estate or of an interest therein, as hereinbefore provided, any right of forfeiture under this provision shall pertain only to such portion.

Release of Lessee in Case of Assignment.

In the event of the making of any such assignment, transfer or sublease, as herein provided for, and the delivery to the Lessors of the instrument containing such information and covenant, together with a copy of any other instrument or instruments by or through which any such assignment, transfer or sublease may have been accomplished, if the Lessors shall have approved in writing of the making [114] of such assignment, transfer or sublease, the Lessee shall thereupon be released and relieved of any obligation hereunder thereafter maturing, in so far as the same may relate or apply to any interest, property or estate acquired by such assignee, transferee

or sublessee under any such assignment, transfer or sublease.

Successors and Assigns.

23. This lease and all of its terms, conditions, covenants and stipulations, unless otherwise provided herein, shall extend to and be binding upon the successors and assigns of the Lessee and upon the successors in interest and assigns of the respective Lessors.

Use of Water Front Property.

24. Lessee covenants not to construct upon the surface of the demised premises within 150 feet of said Channel No. 3 any building, tanks or other structures, and agrees not to occupy the surface of said premises within 150 feet of said Channel No. 3 for any purpose, and that it will at all times keep open and unobstructed on each of said parcels a right of way not less than twenty-four feet in width extending from the nearest public street to said 150 foot strip lying along said Channel No. 3, which said rights of way shall be at all times available to the said Lessors and to their respective licensees, successors in interest and assigns, for ingress to and egress from said respective strips of land; provided, [115] however, that the Lessee shall not be required to surface, pave or repair said rights of way, (unless such repair be necessitated by its acts), nor shall it be liable for any injury which may result to any person while passing or attempting to pass over either of said rights of way and which may have been proximately caused by any defect in or disrepair of such right of way which it was not obligated to remedy or repair as aforesaid.

Bonus.

25. In consideration of the rights in this lease, granted to the Lessee, the Lessee agrees to pay to the Lessors

(in addition to any cash bonus paid for this lease), a bonus of \$25,000.00, in addition to all royalties hereinabove provided for, payable out of ten per cent (10%) of the gross production first obtained from the demised premises.

Covenants Run With Land.

26. All covenants herein contained pertaining to the payment of rents and royalties shall be deemed to be covenants running with the land and shall be binding upon and shall inure to the benefit of the owner or owners of such lands until all of the rights of the Lessee hereunder are finally terminated.

Lessors Acquire No Additional Interest.

27. Anything elsewhere herein contained to the contrary notwithstanding, it is expressly understood and agreed by and between the Lessors, (and so understood by the Lessee), that nothing herein contained shall operate to convey or transfer to any Lessor any greater right or interest in the demised premises than he or it may have had prior to the execution hereof, neither is it the intention of any Lessor herein to assume or become liable for the performance or the lack of performance of any duty or obligation of any other Lessor hereunder.

Change of Address.

28. The Lessee covenants and agrees that it will, in the event it changes its place of business or mailing address, promptly notify the Lessors thereof in writing. The Lessors covenant and agree that in the event they change their respective places of business or mailing addresses at any time while interested hereunder they will give like notice thereof to the Lessee.

Forfeiture for Failure to Drill or Pay Royalty.

29. (a) If the actual drilling of the first well herein provided for has not been commenced within the time herein first provided for the commencement thereof, (unless excused from so doing under Paragraph 5 hereof), this lease shall, at the option of the Lessors, automatically cease and terminate, unless prior to such default the time for the commencement of the drilling of such well shall have been extended by the written consent of the Lessors herein. No such extension shall be granted without the payment in advance by the Lessee of an additional sum of money to be mutually agreed upon [117] and paid at the time of the granting of any such extension, nor shall anything in this paragraph contained be construed as giving to the Lessee any right to demand or receive any such extension.

(b) The failure to pay any rental or royalty payable by the Lessee hereunder within the time herein provided therefor and for 10 days after receipt of written notice of such default given by the Lessors herein shall operate, at the option of the Lessors, to forthwith terminate all of the rights of the Lessee hereunder in and to the demised premises or the portion thereof as to which such default may exist, unless such payment has been excused or prevented by operation of law or by the courts in the enforcement thereof.

Time of Essence.

(c) The Lessee, notwithstanding anything in Paragraph 15 hereof contained, shall not have any time within

which to cure any default in the payment of any rental or royalty payable hereunder except as in this Paragraph 29 provided for; nor shall the Lessee have more than 10 days after receipt of notice of default from the Lessors within which to cure any substantial default in the prosecution of the drilling of said first or any subsequent well or in the operation of any well unless excused from so doing under Paragraph 5 hereof, and the Lessors may, (subject to the exceptions hereinafter in this subparagraph contained), forfeit said lease and all of the rights of the Lessee thereunder for any failure on the part of the Lessee to remedy [118] within the time in this subparagraph permitted any such default in the drilling or operation of any well; provided, however, that any such forfeiture which may result from any default in drilling or operation of any such well or wells shall not operate to deprive the Lessee of the right to retain and operate any existing well or wells as to which no such default may have occurred, and any such existing well or wells so retained and the land surrounding the same which may be reasonably required in the operation thereof shall remain subject to all of the terms and conditions of this lease, but otherwise such forfeiture shall apply to the entire premises, unless the default resulting in such forfeiture shall have occurred on only one of said parcels, in which event it shall apply only to such parcel.

Remedies Cumulative.

30. Any remedies herein provided for shall be deemed to be cumulative with any other remedy or remedies provided by law.

No Provision for Fees or Compensation.

31. No provision of this indenture is made or entered into directly or indirectly for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorney for any party in interest in the bankruptcy proceeding of F. P. Newport Corporation, Ltd., a corporation, bankrupt, for services rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to anyone whomsoever from the assets of said bank- [119] rupt estate is, in accordance with the law, left entirely to the determination of the Court having jurisdiction of said bankruptcy proceeding unaffected by any provision, term or condition, expressed or implied, of this indenture.

Execution Hereof Subject to Approval of Court.

32. This lease is subject to the approval of the District Court of the United States, Southern District of California, Central Division, and it shall not become or be binding upon any one or more of the parties hereto unless and until an order shall have been made and entered by said court in the Matter of the Estate of F. P. Newport Corporation, Ltd., a corporation, Bankrupt, No. 25308-M, now pending in said court, authorizing, approving and confirming the execution hereof by the said Trustee in Bankruptcy of said bankrupt estate.

In Witness Whereof, each of the Lessors has hereunto subscribed its or his (as the case may be) name, and the Lessee has hereunto caused its corporate name to be sub-

scribed, and its corporate seal affixed, by its officers thereunto first duly authorized, the day and year first above written.

O. K. W. C. S.

[Seal] SECURITY-FIRST NATIONAL BANK
OF LOS ANGELES

By J. E. Hatch

Vice President

By R. T. Adams

Asst. Secretary [120]

[Seal] F. P. NEWPORT CORPORATION.
LTD.

By F. P. Newport
President

By J. B. Gribble
Secretary

By H. F. Metcalf

As Trustee in Bankruptcy of F. P. Newport
Corporation, Ltd., Bankrupt.
Lessors.

[Seal] UNIVERSAL CONSOLIDATED OIL
COMPANY

By E. G. Starr
President

By R. D. Miller
Secretary

Lessee.

State of California,
County of Los Angeles—ss.

On this 14th day of January, 1938, before me, Marian Adams, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared J. E. Hatch, known to me to be the Vice President, and R. T. Adams, known to me to be the Assistant Secretary, of Security-First National Bank of Los Angeles, the national banking association that executed the within instrument, known to me to be the persons who executed the within instrument [121] on behalf of said national banking association, and acknowledged to me that such national banking association executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

[Seal]

MARIAN ADAMS

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires May 16, 1940.

State of California,
County of Los Angeles—ss.

On this 14th day of January, 1938, before me, Florence C. Grant, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared F. P. Newport, known to me to be the President, and J. B. Gribble,

known to me to be the Secretary, of F. P. Newport Corporation, Ltd., the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

[Seal]

FLORENCE C. GRANT

Notary Public in and for the County of Los Angeles,
State of California. [122]

State of California,
County of Los Angeles—ss.

On this 14th day of January, 1938, before me, Florence C. Grant, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared H. F. Metcalf, known to me to be the person whose name is subscribed to the within instrument as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., Bankrupt, and acknowledged to me that he executed the same as such Trustee.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

[Seal]

FLORENCE C. GRANT

Notary Public in and for the County of Los Angeles,
State of California.

State of California,
County of Los Angeles—ss.

On this 14 day of January, 1938, before me, June Eddy, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared E. G. Starr known to me to be the President, and R. D. Miller known to me to be the Secretary, of Universal Consolidated Oil Company, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the said corporation, and [123] acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

[Seal]

JUNE EDDY

Notary Public in and for the County of Los Angeles
State of California.

My commission expires March 1, 1941. [124]

[Endorsed]: Filed Jan. 14, 1938 at 30 min. past 4 o'clock p. m. Ernest R. Utley, Referee; Phyllis Gray, Clerk.

[Endorsed]: Filed Nov. 28, 1941. [125]

[SECURITY FIRST NATIONAL BANK EXHIBIT
2—BY REFERENCE]

In the District Court of the United States
Southern District of California
Central Division
No. 25308-M

In the Matter of
F. P. NEWPORT CORPORATION,
Bankrupt.

FINDINGS AND ORDER

On the 19th day of April, 1937, pursuant to notice given to all creditors of this estate, as required by law, the following matters came on for hearing before this court:

1. The petition of H. F. Metcalf for an order authorizing the execution of an agreement with Security-First National Bank of Los Angeles, hereinafter referred to as the "Bank".
2. The objection of McAdoo & Neblett and William H. Neblett as creditors to said petition.
3. The petition of McAdoo & Neblett and William H. Neblett that the security held by the Bank for the payment of its obligations be adjudged to be void, and the order to show cause issued on said petition requiring the Bank to show cause why the prayer thereof should not be granted.

The Bank was represented by Earl E. Moss, W. C. Shelton and George W. Burch, Jr., H. F. Metcalf by Messrs. Bailie, Turner & Lake, McAdoo & Neblett and William H. Neblett by McAdoo, Neblett & Warner, and

E. Walter Guthrie, and the bankrupt by L. M. Cahill. Oral and documentary evidence having been introduced in support of the various petitions and objections, the matter was thereupon submitted to the court for decision.

Thereafter, on the 13th day of May, 1937, pursuant to a motion of H. F. Metcalf, due notice of the hearing thereof having been given as required by law, an order was made vacating and setting aside the submission of the matters hereinbefore referred to, and authorizing and permitting said H. F. Metcalf to file an amendment to his petition and introduce further and additional evidence in support thereof, and setting the further hearing of all of said matters for the 7th day of June, 1937; thereafter an amendment to said petition was filed by said H. F. Metcalf and additional objections thereto were filed by McAdoo & Neblett and William H. Neblett.

Theerafter Hubert F. Laugharn filed his petition requesting instructions from this court as to whether or not he should join with said H. F. Metcalf in the execution of the agreement referred to in said petition of H. F. Metcalf.

On the 18th day of June, 1937, at the hour of 10 o'clock A. M., pursuant to notice given to the [196] creditors of said bankrupt as required by law, all of the foregoing matters and petitions came on regularly for hearing, together with the amended petition of said H. F. Metcalf and additional objections thereto filed by McAdoo & Neblett and William H. Neblett, the same persons appearing as set forth on the first hearing thereof, together with Messrs. Edmund Nelson and Hugo A. Steinmeyer, representing the Bank of America National Trust and Savings Association, Robert B. Powell, Esq., representing Hubert F. Laugharn and certain creditors; Hiram E.

Casey, Esq., representing certain creditors. Oral and documentary evidence was introduced, the matter argued by counsel and submitted to the court for decision, and the court having duly considered the matter now finds as follows:

I.

That a petition in involuntary bankruptcy in this matter was filed on the 19th day of March, 1935, and immediately thereafter an order was issued by this court restraining the said Bank from foreclosing its security, which said restraining order has been maintained in force from time to time despite applications on the part of said Bank for permission to sell the property in accordance with the terms and conditions of said trust; that the said Bank by said orders has been retained from enforcing its contract since the 19th day of March, 1935, during which time neither the receiver of said bankruptcy estate nor the said bankrupt, nor anyone else, has [197] paid any sum on principal, interest or advances of said obligation due the said Bank, and on the contrary since the filing of said involuntary petition in bankruptcy the said Bank has advanced for taxes, assessments and carrying charges on said obligation, up to February 1, 1937, the sum of \$107,768.60, and a speedy liquidation of the property held by said Bank as security for its obligation is necessary to prevent a loss to said bankrupt estate.

II.

That heretofore and on January 12, 1937, the above named F. P. Newport Corporation, Ltd., a corporation, was adjudicated a bankrupt, and the proceedings in the matter of said bankrupt estate were referred to the undersigned Referee for administration.

III.

That thereafter, on notice duly and regularly given as required by law, a first meeting was held before the undersigned as such Referee on February 23, 1937, for the purpose of electing a trustee herein; that certain parties and creditors contend that at said meeting some creditors cast their votes in favor of H. F. Metcalf as trustee herein; that, over the objections of certain creditors the said meeting was continued to February 25, 1937, at ten o'clock A.M.; that on said February 25, 1937, an order was made by the undersigned purporting to appoint Hubert F. Laugharn as trustee herein; that thereafter said Hubert F. Laugharn attempted to [198] qualify as such trustee; that thereafter a review was taken from said order of February 25, 1937.

IV.

That thereafter on March 15, 1937, a hearing was had on the said review before Honorable Paul J. McCormick, Judge of the District Court of the United States, for the Southern District of California; that on March 18, 1937, said Judge made and entered an order setting aside the order made by the undersigned Referee on February 25, 1937, purporting to appoint Hubert F. Laugharn as trustee herein; that by said order of March 18, 1937, it was adjudicated that said H. F. Metcalf was elected trustee herein on February 23, 1937; that by its terms the said order of March 18, 1937, did approve the election of said H. F. Metcalf as such trustee and did fix bonds of said H. F. Metcalf as such trustee in the sum of ten thousand dollars; that thereafter said H. F. Metcalf qualified as such trustee herein and ever since has been and now is acting as such trustee.

V.

That thereafter McAdoo & Neblett and William H. Neblett filed in the United States Circuit Court of Appeals, Ninth Circuit, a petition for leave to appeal from the order of March 18, 1937; that said Circuit Court allowed said appeal but in so allowing it provided that it should not operate as a supersedeas, and a copy of the order allowing said appeal is hereto attached, marked "Exhibit B" and made [199] a part hereof; that said appeal is pending and undetermined.

VI.

That this court has jurisdiction to hear and determine the matters set forth in said petitions and the objections thereto and to make and enter this order.

VII.

That at the date of the adjudication herein, the bankrupt corporation was indebted to said Security-First National Bank of Los Angeles in an amount in excess of \$1,250,000.00; that said indebtedness was and is secured by certain properties transferred to said Bank by the bankrupt corporation on or about March 1, 1930, all of said properties being held by said Bank in accordance with and pursuant to the terms of that certain declaration of trust signed by said Bank under date of March 1, 1930, and approved on said date by the bankrupt corporation, said declaration of trust being commonly known and designated as Security-First National Bank trust No. D-7224 (formerly numbered SS-70401), a copy of which was received in evidence at the hearing of this matter and marked as Exhibit 3.

VIII.

That said declaration of trust is and at all times has been valid and binding upon all parties thereto; that the

title to the property referred to and described in said trust has been and now is held by said Bank, pursuant to the terms and conditions [200] of said trust, as security for the indebtedness due and owing to said Bank by the bankrupt corporation; that under the terms and conditions of said declaration of trust said Bank is entitled to receive all the rents, issues and profits derived from the property held by the said Bank under said trust, together with all oil royalties or bonuses and all such rents, issues and profits are part of the security held by said Bank for said indebtedness.

IX.

That on the 25th day of March, 1935, H. F. Metcalf was appointed receiver of the estate of said bankrupt and duly qualified as such. Thereafter, as the result of extensive negotiations with the officers of the bankrupt corporation and the other interested parties, for the purpose of devising a method of liquidation of the properties held by the Bank as security, in which said bankrupt had an interest, an agreement in writing was executed between the bankrupt corporation and the said Bank and the said receiver, a copy of which is hereto attached, marked "Exhibit A" and made a part hereof, which permitted an orderly liquidation of the secured obligations of said bankrupt due the said Bank. That in said agreement the said Bank consented to a reduction of \$81,278.26 of the total amount then due and waived trustee's fees and expenses to that date, and to a reduction of interest from six per cent to four per cent, and consented that the trustee in bankruptcy, for the purpose of enabling [201] him to finance his sales and operating program, might collect rents for a period of one year to the extent of \$7000.00, and under certain conditions as pro-

vided in said contract an additional \$7000.00 for a second year, and otherwise made substantial concessions tending to enable the bankrupt estate to be liquidated in parcels rather than as a whole, and had said Bank not made such concessions and chose to stand on the letter of its contract, by reason of the long period of time during which the same had been in default, the sum of \$1,351,729.38 cash, plus trustee's fees and expenses, would have been required to pay the said secured obligation due said Bank. That during the period of time that the said receiver has been in office since March 25, 1935, to date, neither said Receiver nor the bankrupt corporation, nor any other party interested in said estate, has found any source from which the said sum of \$1,351,729.38 could be procured in one lump sum to refinance said loan.

X.

That the said agreement, a copy of which is hereto attached marked "Exhibit A", was duly executed by H. F. Metcalf and the bankrupt corporation, in accordance with an order of this court authorizing such execution made pursuant to a petition therefor.

XI.

That the assets of said bankrupt estate consist almost entirely of real property, located principally in what is known as Verdugo Woodlands, San Fernando Valley, and in the Wilmington area; that the Verdugo Woodlands property consists partly of subdivided lots and partly of unsubdivided acreage; that the San Fernando Valley property consists of a ranch of approximately 320 acres of land now ripe for subdivision and sale; the Wilmington property consists of a number of subdivided lots, approximately nine acres on what is

known as Channel No. 3 of the Long Beach Harbor, and approximately sixty acres of unsubdivided property. That there is not intense activity in the Verdugo Woodlands area, and in the San Fernando Valley area, and the present time is propitious for the sale and disposal of the properties of the bankrupt estate located in those areas at prices advantageous to this estate, and it is impossible to determine how long the activity and market for such property will continue to be advantageous. That the subdivided lots in the Wilmington area belonging to said bankrupt estate have a very small value except for their possible oil content. That the nine acres situate on Channel No. 3 is in a particular area where large producing oil wells have been developed and is reputed to be highly valuable for oil purposes. That unless some method is agreed upon for the leasing of the said property under the said trust, a large portion of the oil underlying the said real property may be removed by wells situate upon adjoining properties, and a great detriment and loss will be suffered by the said Bank as a secured creditor and the said bankrupt estate. [203]

XII.

That unless the said proposed contract between the said Bank, the bankrupt and the trustee of this estate is executed promptly, in order to permit liquidation thereunder and protection of the assets held as security by the said Bank and of this estate, the said Bank threatens to withdraw all negotiations for the amicable liquidation of the property of this estate and insist, by reason of the heavy carrying charges of said property and the long period of time during which said obligation has been in default, and the failure of the bankrupt or the receiver or trustee of the bankrupt estate to make any payment on said obliga-

tion, or for taxes, assessments or interest or other carrying charges, on its right to an immediate foreclosure of said obligation and the sale of said property. That it is highly improbable that one single purchaser, or any group of purchasers acting in concert, could be found who would be willing to pay on a sale thereof the sum of \$1,351.-729.38, plus trustee's fees and expenses, interest and advances, to which the Bank would have been entitled upon a foreclosure and sale under the terms of its security.

XIII.

That said agreement of January 12, 1937, should by reason of the passage of time since its execution, and for the benefit and protection of the said bankrupt estate, be modified by the execution of a supplemental agreement in the form attached hereto, marked "Exhibit C" and made a part hereof. [204]

XIV.

The court finds it is for the best interests of the bankrupt estate and absolutely necessary for the preservation thereof, that said agreement of January 12, 1937, as modified in the court's decision and herein, be approved by this court and as so modified it is in all respects fair and equitable.

XV.

That it is untrue that said declaration of trust known as Security-First National Bank trust No. D-7224 hereinbefore referred to is invalid or void for the reasons set forth in the objections filed by McAdoo & Neblett and William H. Neblett or any or either of them, or otherwise.

XVI.

That it is untrue that said agreement of January 12, 1937, hereinbefore referred to, is unfair or inadequate or

invalid or void for the reasons or any or either of them alleged in the objections filed by McAdoo & Neblett and William H. Neblett or otherwise.

XVII.

That the obligations of said bankrupt to said Bank are evidenced by promissory notes described as follows:

Date of Note	Principal	Rate of Interest	Maturity
March 1, 1930	\$760,000.00	7% quarterly	Mar. 1, 1932
June 7, 1932	164,500.00	7% quarterly	Dec. 7, 1932
Dec. 2, 1932	11,060.45	7% quarterly	June 2, 1933
Dec. 30, 1932	10,203.90	7% quarterly	June 30, 1933
May 12, 1933	90,335.58	7% quarterly	May 12, 1934
June 16, 1933	400.00	7% quarterly	May 12, 1934
Oct. 2, 1933	500.00	7% quarterly	May 12, 1934
March 27, 1934	784.57	7% quarterly	May 12, 1934

[205]

That the payment of the above described promissory notes was secured by transfers and conveyances of certain real and personal property executed by the said bankrupt corporation in favor of said Bank, and the terms and conditions under which said transfers and conveyances were made are set forth and declared in a declaration of trust, a copy of which was introduced in evidence herein and marked Exhibit 3.

That the said promissory notes were not sold or offered to be sold to an underwriter for the purposes of sale, or to the public or any person, but were issued by the said bankrupt corporation as evidence of money loaned to it by said Bank, and were delivered to said Bank and have been held and retained by it since their issuance and delivery.

That the said transfers and conveyances of said property were executed and delivered by the bankrupt corporation to the said Bank for the purpose of securing the payment of said promissory notes, and also advances made by the trustee under said declaration of trust and for the costs, fees and expenses of said trustee, and said transfers and conveyances to the Bank are not securities for the issuance, execution and delivery of which a permit of the Commissioner of Corporations of the State of California is required by the Corporate Securities Act of the State of California.

That the said declaration of trust executed by said Bank and approved by said bankrupt corpora- [206] tion was so executed and approved for the purpose of designating the terms and conditions under which the said Bank held title to the property of the bankrupt corporation, and for the purpose of securing the payment of said promissory notes, and is not a security for the issuance, execution and delivery of which a permit of the Commissioner of Corporations of the State of California is required by the Corporate Securities Act of the State of California.

That the said promissory notes constitute secured obligations as described by subdivision 11, subsection (b) of paragraph 2 of the Corporate Securities Act of the State of California, and the said Corporate Securities Act does not apply to the said promissory notes.

XVIII.

That Hubert F. Laugharn, who was appointed by the undersigned Referee in Bankruptcy as trustee of the above named bankrupt, as hereinabove set forth, has petitioned the court for instructions as to whether or not he should sign the said contract and be bound by the same in the

event it should later be adjudged by a court of competent jurisdiction that his appointment was legal and valid, and the order of the United States District Court adjudging H. F. Metcalf to have been elected trustee reversed. That in order to assure prospective purchasers and lessees of property of the bankrupt estate, in which it has an interest, that the right, title or interest which they may procure in purchasing or leasing property from the said bankrupt [207] estate and the said Bank, is legal and valid, and that it may not be disaffirmed later by said Hubert F. Laugharn in the event of a reversal of the order of the said United States District Judge adjudging said H. F. Metcalf to have been elected trustee, and for the purpose of enabling the trustee and the Bank and prospective purchasers and lessees of such property to procure policies of title insurance (without which many prospective purchasers and lessees would refuse to purchase or lease) it is necessary and for the benefit and advantage of the said bankrupt estate and the said Bank that said Hubert F. Laugharn execute said contract and be bound by the terms thereof in the event of such reversal of the order of the United States District Court, and also execute any deeds, conveyances, leases or other documents necessary to vest title in prospective purchasers, and lessees, or advisable to eliminate any possible question as to the validity of any such documents.

XIX.

That to adjudge the security held by the Bank for the obligations of the bankrupt to be void would enable the borrower to have and retain the proceeds of the loan without giving any security therefor, and would be unconscionable and inequitable.

XX.

That at the time the first loan was made by said Bank to said bankrupt, William H. Neblett, a member of the copartnership of McAdoo & Neblett, [208] creditor herein, was an officer, to-wit: Vice-President of said bankrupt corporation, as well as a director thereof, and had knowledge of all the facts, conditions and circumstances concerning the making of said loan herein set forth, and with such knowledge, as such officer, accepted the said loan and accepted the benefits thereof, and is estopped to deny the validity of said Bank's security.

XXI.

That the moneys loaned by said Bank to the bankrupt corporation were for the benefit of the latter, and the said bankrupt corporation having accepted the benefits of the transactions cannot deny its burdens, and the said bankrupt corporation and its creditors are estopped to allege the invalidity of said Bank's security.

XXII.

That on the 19th day of April, 1937, the date of the hearing of the first petition of H. F. Metcalf, no objections of any kind were filed or made to the said petition other than the objections of McAdoo & Neblett and William H. Neblett and the petition of McAdoo & Neblett and William H. Neblett.

That on the 18th day of June, 1937, the last date of the hearing of the various matters then at issue, and the various petitions concerning the execution of said contract, no objections were made or filed other than the said objections of McAdoo & Neblett [209] and William H. Neblett and the petition of McAdoo & Neblett and William H. Neblett, and the objection of the bankrupt to the jurisdiction of the court.

XXIII.

The Court finds that said agreement of January 12, 1937, should be modified so as to require all moneys derived from said secured property to flow through the hands of the trustee in bankruptcy and the said trustee in bankruptcy be required to account to the court for the disposition thereof.

XXIV.

No finding is made herein as to the value of the security held by the Bank for the payment of its obligations.

Now, Therefore, good cause appearing,

It Is Hereby Ordered:

1. That that certain agreement dated January 12, 1937, hereinbefore referred to, a copy of which is hereto attached and marked "Exhibit A", be and the same is hereby approved by the court modified by the supplemental agreement in the form hereto attached, marked "Exhibit C" and made a part hereof, and as so modified both the said agreement and supplemental agreement are hereby approved.
2. That H. F. Metcalf, as Trustee in Bankruptcy of the Estate of the above named bankrupt corporation, be and he is hereby authorized and directed to approve and execute as such trustee the said agreement as modified by the execution of the sup- [210] plemental agreement in the form attached hereto, marked "Exhibit C" and made a part hereof.

3. That the petition of Hubert F. Laugharn for instructions is granted and he is hereby authorized and directed to approve and execute the said agreement as modified by the execution of the supplemental agreement in the form attached hereto, marked "Exhibit C" and made a part hereof.

4. That upon approval and execution by said H. F. Metcalf as such trustee of the said agreement of January 12, 1937, as modified, the same shall be binding upon the bankrupt and the bankrupt estate and any trustee who may hereafter be elected or appointed, and shall duly qualify, and upon Hubert F. Laugharn, or any other person who by final decree of a court of competent jurisdiction is adjudged to be the Trustee in Bankruptcy of the estate of the above named bankrupt corporation.

5. To facilitate the securing of policy of title insurance, It Is Ordered that the bankrupt corporation execute the modification of said contract of January 12, 1937, hereinbefore referred to.

Dated: August 13, 1937.

ERNEST R. UTLEY.

Referee in Bankruptcy. [211]

[Endorsed]: Filed Aug. 9, 1937 at 30 min. past 10 o'clock a. m. Ernest R. Utley, Referee; Blanche Morris, Clerk.

[Endorsed]: Filed Sep. 17, 1937. [212]

[Title of District Court and Cause.]

ORDER APPROVING AND CONFIRMING THE
FINDINGS AND ORDER OF THE REFEREE
HEREIN DATED AUGUST 13, 1937, AS MODI-
FIED BY THIS COURT.

Be It Remembered:

That heretofore on September 24, 1937, there came on regularly for hearing before this Court, pursuant to notice duly given, the motion of H. F. Metcalf, Trustee in Bankruptcy herein, for an order approving and confirming the findings, order, and rulings heretofore signed, made, and entered by Honorable Ernest R. Utley, Referee in Bankruptcy, on August 13, 1937, concerning which a petition for review had theretofore been filed by Messrs. McAdoo & Neblett and William H. Neblett.

That thereafter the hearing on said matter was duly and regularly continued from time to time until October 14, 1937, at which time an order was duly made and entered herein by this Court approving and confirming the said findings, order, and rulings of said Referee as modified by a certain stipulation and agreement in writing filed with and approved by this Court on October 14, 1937, entitled "Stipulation Re Modification of Contract or Agreement of January 12, 1937."

That thereafter said Messrs. McAdoo & Neblett and William H. Neblett duly moved to set aside the said order of this Court entered on October 14, 1937; that said

motion came on regularly for hearing before this Court on October 25, 1937; that the Court thereupon made and entered its order setting aside the said order of October 14, 1937, and taking under submission for further consideration the said motion of H. F. Metcalf and continuing the hearing thereon to October 29, 1937. [213]

That on said October 29, 1937, at the hour of ten o'clock A. M. there came on regularly for hearing before this Court the motion of H. F. Metcalf as such Trustee, W. C. Shelton, Esq. and Earl E. Moss, Esq. appearing as Counsel for Security-First National Bank of Los Angeles, L. M. Cahill, Esq. appearing as Counsel for the Bankrupt herein, Hubert F. Laugharn, Esq. appearing in propria persona, W. Mosley Jones, Esq. appearing for and on behalf of Messrs. McAdoo & Neblett and William H. Neblett, and Norman A. Bailie, Esq. and Allen T. Lynch, Esq. appearing as Counsel for H. F. Metcalf, Trustee;

That thereupon there was submitted to this Court for approval a stipulation and agreement in writing entitled "Stipulation Re Modification of Supplemental Agreement Dated August 31, 1937." That after hearing the argument of certain counsel then present, the Court approved said stipulation and agreement and the same was filed.

And it appearing to the Court that the contract and supplemental contract referred to in the Referee's said findings and order as modified by the stipulations and agreements approved by this Court as hereinbefore mentioned are equitable, fair, and advantageous to this bank-

rupt estate and are not contrary to or in violation of any of the provisions of the Bankruptcy Act or of "Public Law No. 373—75th Congress, Chapter 777—1st Session" (sometimes referred to as the Borah Act) or any other law; and good cause appearing therefor,

It Is Ordered by the Court:

1. That said findings, order and rulings of the Honorable Ernest R. Utley, Referee in Bankruptcy herein, dated August 13, 1937, be and they are hereby approved and confirmed as modified by the stipulation and agreement filed herein and approved by this Court on October 14, 1937, entitled "Stipulation Re Modification of Contract or Agreement of January 12, 1937" and the stipulation and agreement filed herein and approved by this Court on October 29, 1937, entitled [214] "Stipulation Re Modification of Supplemental Agreement Dated August 31, 1937."
2. That the agreement of January 12, 1937, and the supplement thereto, both referred to in the Referee's said findings and order of August 13, 1937, modified as provided in the said stipulation and agreement filed October 14, 1937, entitled "Stipulation Re Modification of Contract or Agreement of January 12, 1937" and said stipulation and agreement filed October 29, 1937, entitled "Stipulation Re Modification of Supplemental Agreement Dated August 31, 1937" be and they are hereby approved and ratified and the Trustee or Trustees of this bankrupt estate is or are authorized and instructed to perform all

the terms and provisions thereof required therein to be performed by such Trustee or Trustees.

Dated this 5th day of November, 1937.

PAUL J. McCORMICK
United States District Judge.

Approved as to form under Rule 44.

L. M. CAHILL

Counsel for the Bankrupt

W. C. SHELTON,

GEORGE BURCH, JR. AND

EARL E. MOSS

By W. C. SHELTON

Counsel for Security-First Nat. Bank

ROBERT B. POWELL

Counsel for Hubert F. Laugharn

BAILIE, TURNER & LAKE

By NORMAN A. BAILIE

Counsel for H. F. Metcalf, Trustee in Bankruptcy.

WM. MOSLEY JONES

Counsel for McAdoo & Neblett
and William H. Neblett.

[Endorsed]: Filed Nov. 5, 1937. [215]

[SECURITY FIRST NATIONAL BANK'S EXHIBIT
3—BY REFERENCE.]

IN RE F. P. NEWPORT CORPORATION, Limited.*
McADOO & NEBLETT et al. v. F. P. NEWPORT
CORPORATION, Limited.

No. 8703

Circuit Court of Appeals, Ninth Circuit.
July 27, 1938.

* * * * *

Appeal from the District Court of the United States
for the Southern District of California, Central Di-
vision; Paul J. McCormick, Judge.

In the matter of F. P. Newport Corporation, Limited,
bankrupt. From orders of the bankruptcy court approv-
ing an agreement as modified by referee's order with fur-
ther modification, which H. F. Metcalf, trustee, the bank-
rupt and the Security-First National Bank of Los Ange-
les had by stipulation agreed to, McAdoo & Neblett, a
copartnership consisting of William G. McAdoo and Wil-
liam H. Neblett, and William H. Neblett appeal.

Affirmed.

Wm. H. Neblett, Harry W. Dudley, and E. Walther
Guthrie, all of Los Angeles, Cal. (Allen H. McCurdy, of
Los Angeles, Cal., of counsel), for appellants.

W. C. Shelton of Los Angeles, Cal., for appellee Se-
curity-First Nat. Bank of Los Angeles.

*Rehearing denied Sept. 10, 1938.

Bailie, Turner & Lake, Norman A. Bailie and Allen T. Lynch, all of Los Angeles, Cal., for appellee Metcalf, Trustee.

Before WILBUR, DENMAN, and MATHEWS, Circuit Judges.

MATHEWS, Circuit Judge.

This appeal is from two orders—one made orally, the other in writing, the two constituting, in effect, one order—whereby the District Court, sitting in bankruptcy, approved, with modifications, an agreement dated January 12, 1937, between F. P. Newport Corporation, Limited, bankrupt, H. F. Metcalf, receiver [216] (now trustee) in bankruptcy, and Security-First National Bank of Los Angeles, a creditor of the bankrupt, and directed Metcalf, as trustee, to perform the agreement. The facts are as follows:

On or about March 12, 1930, F. P. Newport, Lettie J. Newport, Charles O. Middleton, Henrietta A. Middleton and T. L. Dudley conveyed certain real estate to Title Guarantee & Trust Company of Los Angeles (hereafter called the trust company). Concurrently therewith and as part of the same transaction, they and the trust company executed an agreement constituting, in effect, a declaration of trust (No. P-1512), which provided that the trust company should hold the real estate in trust for their benefit, subject to the terms and provisions of the agreement. On March 20, 1930, F. P. Newport and Lettie J. Newport assigned their beneficial interest in trust No. P-1512 to the bankrupt, by an instrument reading as follows:

"For value received we, F. P. Newport and Lettie J. Newport husband and wife do hereby grant, as-

sign, transfer and set over unto (the bankrupt) our total beneficial interest in and to the trust evidenced by that certain declaration of trust dated March 12, 1930, and issued¹ by (the trust company) under its trust No. P.-1512, together with a like interest in and to the net proceeds and avails arising or growing out of the said trust, and (the trust company) is hereby authorized to pay and turn over unto (the bankrupt) all moneys and benefits growing out of the said interest hereby assigned and to consider (the bankrupt) a beneficiary under said trust to the extent of said interest."

The bankrupt was at that time indebted to Security-First National Bank of Los Angeles (hereafter called the bank) in the sum of \$760,000, with 7% interest from March 1, 1930, which [217] indebtedness was evidenced by the bankrupt's promissory note payable to the bank on March 1, 1932. As security therefor, the bankrupt, on March 25, 1930, conveyed certain real estate to the bank and, at the same time, by an instrument identical in form with that executed by the Newports, assigned to the bank the beneficial interest in trust No. P.-1512 which the Newports had theretofore assigned to the bankrupt. Concurrently therewith and as part of the same transaction, the bank and the bankrupt executed a declaration of trust (No. SS-70401, subsequently designated No. D-7224),² which declared that the conveyance and assignment,

¹An obvious misuse of the word "issued". The trust company executed, but did not "issue", the declaration of trust.

²This declaration and the conveyance therein referred to were dated March 1, 1930. The assignment referred to was dated March 20, 1930. Actually, the declaration was executed and the conveyance and assignment were delivered on March 25, 1930.

though in terms absolute, were intended to be, and were, made to and received by the bank in trust, with power of sale, as security for the payment of the above mentioned note, and for the payment of any additional sums which might thereafter be borrowed by the bankrupt from the bank and be evidenced by other promissory notes of the bankrupt.

The bankrupt did, in 1932, 1933 and 1934, borrow from the bank additional sums aggregating, exclusive of interest, \$277,784.50. This additional indebtedness was evidenced by seven promissory notes of the bankrupt, one of which became due and payable in 1932, two in 1933 and four on May 12, 1934. Thus, on and after May 12, 1934, there was due and owing by the bankrupt to the bank \$1,037,784.50, plus interest. On March 19, 1935, the total amount of said indebtedness, including interest, exceeded \$1,250,000.

(1) The conveyance and assignment by the bankrupt to the bank, together with the declaration of trust executed by them, constituted a deed of trust. *Doane v. California Land Co.*, 9 Cir., 243 F. 67; *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 P. 813; *Younger v. Moore*, 155 Cal. 767, 103 P. 221; *McDonald v. Smoke Creek Live Stock Co.*, 209 Cal. 231, 286 P. 693; *Petit v. Blenckiron*, 16 Cal. App. 2d 751, 61 P. 2d 527. [218]

On March 19, 1935, a petition in involuntary bankruptcy was filed against the bankrupt. On March 25, 1935, H. F. Metcalf was appointed receiver of the bankrupt estate, and qualified as such. On January 12, 1937, pursuant to an order of the bankruptcy court authorizing and directing him to do so, the receiver made and entered into an agreement with the bankrupt and the bank, whereby the bank consented to a reduction in amount

and to an extension of time for payment of the indebtedness owing to it by the bankrupt, and the bankrupt agreed not to oppose the pending petition to have it adjudged a bankrupt. The agreement provided that the bankrupt's indebtedness to the bank should be paid in five installments, the first to be due on August 1, 1937, the last (and largest) on February 1, 1940; that, to provide money for these payments, the property covered by the deed of trust should be sold or leased on terms and conditions satisfactory to the bank and to the trustee in bankruptcy (thereafter to be appointed), and subject to the approval of the bankruptcy court; and that such trustee, when appointed, should petition the bankruptcy court for an order authorizing him to become a party to the agreement and to be bound by the terms and conditions thereof.

On the day the agreement was executed—January 12, 1937—the bankrupt was adjudged a bankrupt, and the case was referred to a referee. The creditors having failed to elect a trustee, the court on March 18, 1937, appointed Metcalf as trustee, and Metcalf thereupon qualified as such. An appeal from the order appointing him was allowed by this court, but the order allowing such appeal expressly provided that it should not operate as a supersedeas. The order appointing Metcalf as trustee was affirmed on December 22, 1937. *In re F. P. Newport Corp.*, 93 F. 2d 630. [220]

On March 19, 1937, Metcalf, as trustee, petitioned the court for an order authorizing him to become a party to and be bound by the agreement of January 12, 1937. Appellants, McAdoo & Neblett and William H. Neblett, op-

posed the trustee's petition. After hearing the matter, the referee on August 13, 1937, made an order approving, with modifications, the agreement of January 12, 1937, and authorizing the trustee to become a party thereto and to be bound thereby. On petition for review, the court on October 29, 1937, and November 5, 1937, modified the referee's order and affirmed it as modified. Thereby, the court approved the agreement of January 12, 1937, as modified by the referee's order, with further modifications³ which the trustee, the bank and the bankrupt had by stipulation agreed to, and ordered that the agreement, as thus modified, be performed by the trustee. This appeal followed.

(2) The appeal is prosecuted by appellant McAdoo & Neblett as an unsecured creditor and by appellant William H. Neblett as a stockholder of the bankrupt. There is no appeal by the bankrupt or the trustee. As a stockholder of the bankrupt appellant William H. Neblett was not and could not have been aggrieved by the order appealed from. As such stockholder, therefore, he has no interest or standing to prosecute this appeal.

(3) It is contended by McAdoo & Neblett (hereafter called appellant) that the trial court had no jurisdiction to make the order now under review, because, at the time it was made, the appeal from the order appointing Metcalf

³The effect of the modifications was to extend the time for paying the five installments mentioned in the agreement, and to require all payments for property sold thereunder to be made to the trustee.

as trustee was still pending. There is no merit in this contention. The former appeal was not taken as of right, but was allowed by this court in the exercise of its discretion, pursuant to § 24b of the Bankruptcy Act, 11 U. S.C.A. § 47(b). As previously stated, the order allowing that appeal expressly provided that it should not operate as a supersedeas. It did not so operate, nor did it deprive the trial court of jurisdiction to proceed in the case. The cases [221] cited by appellant⁴ as supporting its contention bear no resemblance to this case and, obviously, are not in point.

(4) Appellant contends that the deed of trust⁵ securing the bankrupt's indebtedness to the bank was void and unenforceable, because issued in violation of the California Corporate Securities Act, §3 of which, as it stood on March 25, 1930 (Stats. 1917, p. 675), provided: "No company shall sell * * * or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner (of corporations) a permit authorizing it so to do. * * *"

Section 12 of the Act (Stats. 1917, p. 679), provided: "Every security issued by any company, without a permit

⁴First National Bank v. State National Bank, 9 Cir., 131 F. 430; Rothschild & Co. v. Marshall, 9 Cir., 51 F. 2d 897; Great Western Stage Equipment Co. v. Iles, 10 Cir., 70 F. 2d 197; Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P. 2d 706; Oakland Paving Co. v. Donovan, 19 Cal. App. 488, 126 P. 388.

⁵Comprising, as before stated, the conveyance and assignment by the bankrupt to the bank and the declaration of trust executed by them on March 25, 1930.

of the commissioner authorizing the same then in effect, shall be void * * *."

The deed of trust securing the bankrupt's indebtedness to the bank was not issued by the bank. If issued at all, it was issued by the bankrupt. Assuming, without deciding, that it was issued, and that it was a security for the issuance of which a permit was required, it was the bankrupt's, not the bank's, duty to apply for and obtain such permit. If issuance of the deed of trust without a permit was a violation of the Corporate Securities Act, the bankrupt was the violator, and the bank was the victim of such violation. Being itself the wrongdoer, the bankrupt cannot, nor can its trustee or creditors, take advantage of its own wrong and thus defraud the innocent party to the transaction. *Laugharn v. Bank of America National Trust & Savings Ass'n*, 9 Cir., 88 F. 2d 551, 554;⁶ *Eberhard v. Pacific Southwest Loan & Mortgage Corp.*, 215 Cal. 226, 228, 9 P. 2d 302, 303; *Western Oil & Refining Co. v. Venago Oil Corp.*, 218 Cal. 733, 743, 24 P. 2d 971, 975, 88 A.L.R. 1271; *Domestic & Foreign Petroleum Co. v. Long*, 4 Cal. 2d 547, 558, 51 P. 2d 73, 78; *Robbins v. Pacific Eastern Corp.*, 8 Cal. 2d 241, 277, 65 P. 2d 42, 61. We hold, therefore, that, as to the bank, the deed of trust was valid and enforceable. [223]

⁶Overruling *Cecil B. DeMille Productions v. Woolery*, 9 Cir., 61 F. 2d 45, cited by appellant.

(5) As to the validity of the declaration of trust executed by the trust company, the Newports and others on March 12, 1930, or of the assignment by the Newports to the bankrupt of their interest in that trust, we express no opinion. Since these instruments took nothing from the bankrupt, but were, instead, the source of its title to part of the estate now being administered for the benefit of its creditors, including appellant, appellant cannot be heard to question their validity.

In approving, with modifications, the agreement of January 12, 1937, the trial court has not, as contended by appellant, surrendered its jurisdiction to administer the bankrupt estate. The court retains and is exercising that jurisdiction by and through the trustee in bankruptcy.

Nor is it true that, under the agreement, administration of the estate will be unduly prolonged, or, as appellant says, "projected into the future." Under the agreement, as modified, liquidation of the bank's claim must be completed on or before September 7, 1940. That does not seem to us an unreasonable time.

(6) Appellant assigns as error the trial court's finding that the agreement, as modified, was equitable, fair and advantageous to the bankrupt estate. The question thus attempted to be raised is one of fact, which, on this appeal, under §24b of the Bankruptcy Act, 11 U. S. C. A. §47(b), we may not consider, our review in such cases being limited to questions of law.

Orders affirmed. [225]

[SECURITY FIRST NATIONAL BANK'S
EXHIBIT 4]

Copy

July 30, 1943

Mr. H. F. Metcalf
Trustee in Bankruptcy for
F. P. Newport Corporation, Ltd., a Bankrupt,
Central Building
Los Angeles, California
and
F. P. Newport Corporation, Ltd.
Central Building
Los Angeles, California

You and each of you will please take notice that there remains unpaid, due and owing from the Bankrupt, F. P. Newport Corporation, Ltd., to Security-First National Bank of Los Angeles, upon the obligations due by said bankrupt to said Bank, the following amounts:

- (1) An unpaid balance on the principal of the loan of said Bank to said Bankrupt.....\$617,378.12
- (2) Interest on said loan at the rate of 4% per annum from June 7, 1943.
- (3) Trust advances made by the Security-First National Bank of Los Angeles, as Trustee, under and in accordance with the terms of Declaration of Trust D 7224..... 17,897.73
- (4) Fees payable to Security-First National Bank of Los Angeles, as Trustee of Trust No. D 7224, in accordance with the said Declaration of trust 4,518.22

Demand is hereby made for the payment of said sums, now long overdue and unpaid.

Unless said sums be paid to said Security-First National Bank of Los Angeles *with* sixty (60) days from the date of service of this notice upon you, the said Bank will be compelled to foreclose its security for the payment of said obligations in accordance with the terms and conditions of said Declaration of Trust No. D 7224, and the contract of January 12, 1937 (as modified and amended between you and each of you and Security-First National Bank of Los Angeles).

This notice is in compliance with Article II of said Declaration of Trust No. D 7224, and the Agreement of January 12, 1937, as modified and amended.

Please take further notice, that since the execution of said Agreement of January 12, 1937, Mr. H. F. Metcalf, as Trustee in Bankruptcy, has collected and retained for the use of the Bankrupt Estate certain rents, issues and profits of the Trust Estate not exceeding \$7,000, except the income from oil leases. [226]

H. F. Metcalf and F. P. Newport Corporation, Ltd.
—2—7—30—43

Under said Agreement of January 12, 1937, the Bank agreed thereto for a period of one (1) year. This Agreement was extended for approximately one year more. Thereafter the collection and retention of said rents, issues and profits was acquiesced in by the Bank.

This is to notify you that, from the date of this notice, the Trustee in Bankruptcy, Mr. H. F. Metcalf, is requested to make such collections of said rents, issues and profits and to hereafter hold and disburse them strictly in accordance with the terms and conditions of said Declaration of Trust No. D 7224 and the Contract of January 12, 1937, as modified and amended.

Security-First National Bank of Los Angeles revokes its tacit consent to the use of these funds by the Trustee in Bankruptcy as above noted, and demands *there* hereafter all funds subject to the provisions of said Declaration of Trust D 7224 and the Agreement of January 12, 1937, as modified and amended, be collected and disbursed strictly in accordance with said Declaration of Trust and said Agreement.

Dated this 30th day of July, 1943.

SECURITY-FIRST NATIONAL BANK
OF LOS ANGELES

By R. T. Adams
Assistant Secretary.

Re No. 25308-M. F. P. Newport Corporation, Ltd.,
U. S. Gov't vs. Trustee and Re Pet. to Security First Na-
tional Bank Re foreclosure. Exhibit No. 4. Filed 11-23,
1943. Ernest R. Utley, (R.) Referee. [227]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER RE PAYMENT OF FEDERAL
INCOME TAXES FOR CALENDAR YEARS
1938 and 1939

On September 24, 1943, there was filed in these proceedings by the United States of America a Petition for Order to Show Cause Why Trustee Should Not Be Directed to Pay 1938 and 1939 Federal Income Taxes. On the filing of said petition an order to show cause was issued by this Court directed to H. F. Metcalf, as Trustee in Bankruptcy herein, and Security-First National Bank of Los Angeles, a national banking association, directing them and each of them to appear before this Court on September 30, 1943, at the hour of ten a. m., then and there to show cause if any they had why an order should not be made herein directing the Trustee in Bankruptcy to pay the 1938 and 1939 federal income taxes and interest thereon from the funds or income of the above entitled bankrupt estate. Answers to said petition and order to show cause were filed by the said Trustee in Bankruptcy and said Bank. The said matter came on for hearing before this Court on September 30, 1943, at the hour of ten a. m. and was thereupon, and from time to time thereafter, continued to November 23, 1943. [37]

On November 23, 1943, the said matter came on for hearing at the hour of ten a.m. Messrs. Charles H. Carr, United States Attorney, E. H. Mitchell, Assistant United States Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, by Eugene Harpole, Esq., appeared as Counsel for United States of America and

Collector of Internal Revenue; Messrs. Bailie, Turner & Lake by Allen T. Lynch, Esq., appeared as Counsel for H. F. Metcalf as Trustee in Bankruptcy herein; Messrs. W. C. Shelton and George W. Burch, Jr., appeared as Counsel for Security-First National Bank of Los Angeles; Edmund Nelson, Esq., appeared as Counsel for Bank of America National Trust and Savings Association; and L. M. Cahill, Esq., appeared as Counsel for the Bankrupt.

Evidence oral and documentary was offered and received on the hearing of said matter for and on behalf of the respective parties and the matter was argued by Counsel and submitted for decision by the Court; and, being fully advised in the premises,

The Court Finds:

I.

That on or about March 1, 1930, F. P. Newport Corporation, Ltd., a corporation, the bankrupt herein, borrowed from Security-First National Bank of Los Angeles the sum of \$760,000.00, which is the same debt as that mentioned in the contract of January 12, 1937, more particularly hereinafter mentioned, including accretions thereto by way of accumulation of interest, additional borrowings, advances for taxes and for trustee's fees and expenses of the said bank.

II.

That on or about March 1, 1930, F. P. Newport Corporation, Ltd., a corporation, conveyed to the Security-First National Bank of Los Angeles title to certain real property by four different grant deeds, the same being recorded in Book 9902, page 28, Book 9868, page 150, Book 9850, page 181, and Book 9838, page 216, respectively, of Official Records of Los Angeles County.

California. That concurrently [38] with the execution of said grant deeds to said Bank, the said Bank executed and delivered to F. P. Newport Corporation, Ltd. its certain written declaration of trust, under date of March 1, 1930, now known and referred to as Trust No. D 7224, formerly known and numbered Trust SS 70401, by the terms of which it acknowledged that it had received a conveyance of said property as trustee, with power of sale, as security for the payment of said loan of \$760,000.00 made by said Bank to said F. P. Newport Corporation, Ltd., and as security for all advances, costs, trustee's fees, and expense advance and incurred under the terms of said declaration of trust.

III.

That thereafter F. P. Newport Corporation, Ltd. by three different grant deeds, conveyed to said Bank title to certain additional real property, under and pursuant to the terms of said declaration of trust, and as additional security for the payment of said indebtedness, said deeds being recorded in Book 11510, page 239, Book 11493, page 271, and Book 9929, page 62, respectively, of Official Records of Los Angeles County, California.

IV.

That the properties so transferred to said Bank and record title to which is now held by it pursuant to the terms of said declaration of trust, consist largely of real property, some of which is located in what is known as "Verdugo Woodlands" and some in the San Fernando Valley, and some in the Wilmington Harbor area. That the Verdugo Woodlands property consists partly of subdivided lots and partly of unsubdivided acreage; that the San Fernando Valley property consists of approximately 154 acres; that the Wilmington Harbor property con-

sists of a number of subdivided lots, nine acres of which is on what is known as Channel No. 3 of the Long Beach Harbor, and approximately 20 acres of unsubdivided property in said habor area.

V.

That on or about March 1, 1930, F. P. Newport Corporation, [39] Ltd., as further and collateral security for the aforementioned indebtedness, by written assignment, pledged to the Security-First National Bank of Los Angeles the entire beneficial interest in and to said Trust No. D 7224. That on May 16, 1933, the said Bankrupt Corporation, F. P. Newport Corporation, Ltd., and F. P. Newport and Letitia J. Newport, his wife, granted to said Security-First National Bank of Los Angeles as trustee all of their right, title and interest in and to the real property situated on Channel No. 3, in the Long Beach Harbor area, containing nine acres more or less, the said grant deed being recorded in Book 1226, page 21 of Official Records of Los Angeles County. That said property so conveyed had previously been conveyed to the said Bank as such trustee on March 20, 1930, and said deed of May 16, 1933, confirmed and ratified said prior conveyance to said Bank. That the legal title to said nine acre parcel of land was then vested in Title Guarantee & Trust Co., as trustee. That subsequently to the said above mentioned conveyance and prior to the execution of the oil lease hereinafter referred to, the said Bank at the request of H. F. Metcalf, Trustee in Bankruptcy, and upon the order of the above entitled Bankruptcy Court, did advance a large sum of money to compromise the claims of various persons in and to said nine acre tract of land. That upon said adverse claims being so satisfied and discharged the legal title to said nine acre tract was conveyed to Security-

First National Bank of Los Angeles by said Title Guarantee & Trust Co. to be held by said Bank subject to the terms and conditions of said declaration of trust D 7224, and the contract of January 12, 1937, as supplemented, modified and amended. That under the order of the said Bankruptcy Court, said advance was added to and became a part of the indebtedness owing to said Bank by said Bankrupt.

VI.

That the said declaration of trust No. D 7224 provides, among other things, as follows: [40]

"Article Sixteenth: All proceeds and avails arising from the rents, issues, leases and sales of the Trust property, or otherwise, shall be paid to and received by the said Trustee, and said Trustee shall disburse all such proceeds and avails as follows:

* * * * * * *

"III. All proceeds and avails arising from the leases and rentals of said property so received by the said Trustee shall be credited to the General Fund.

* * * * * * *

"VII. Out of the moneys credited to the General Fund the Trustee shall pay:

1st: Its accrued costs, fees and expenses as hereinafter determined, unless they be sooner paid;

2nd: The taxes, assessments and installments of principal and interest on street bonds assessed or imposed on or against said property then due and unpaid, not payable by the purchaser thereof from the said Trustee.

Should the moneys in the hands of the Trustee available for that purpose be insufficient to pay said

taxes and assessments, and installments of the principal and interest on the street bonds when due, then the Beneficiary by its ratification of this Declaration of Trust, covenants and agrees to immediately pay any deficiency in the amount due on said taxes, assessments and bonds to the Trustee.

3rd. Any improvements upon the Trust property, upon the order of the Beneficiary hereunder, or its duly authorized Agent, and/or as contracted by the Trustee as provided for in Article Fourteenth hereof;

4th. Interest, as and when due, on any note se- [41] cured hereby, if there are not sufficient moneys in the Interest Fund with which to pay the same;

5th: Any liens or incumbrances covering the property sold, not payable by the purchaser thereof from the said Trustee;

6th: Principal upon any note secured hereby in favor of the Payee after the due date thereof; and

7th: Subject to the foregoing provisions, and provided the Beneficiary is not in default in any manner under the terms of this Declaration of Trust, all of the balance of the moneys received by the said Trustee shall be applied, disbursed and paid in convenient monthly installments to F. P. Newport Corporation, Ltd., a Delaware Corporation, the Beneficiary hereunder, its successors or assigns."

VII.

That the indebtedness secured by said declaration of trust and the collateral pledge of the beneficial interest therein being long past due, the said Security-First National Bank of Los Angeles, as trustee under said declaration of trust, did in accordance with the provisions

of said declaration of trust declare the entire unpaid balance of the obligation to be due, and fixed the date for the sale of the real property, standing in the name of said Bank as said trustee, for March 29, 1935.

VIII.

That on March 19, 1935, an involuntary petition in bankruptcy was filed against the above named Bankrupt. Thereafter, and on or about March 25, 1935, H. F. Metcalf was appointed Receiver in Bankruptcy of all the property and assets of the above named Bankrupt Corporation, including the property record title to which was held by the said Security-First National Bank of Los Angeles as such trustee, and the above entitled Court duly restrained said Bank from [42] proceeding with said foreclosure sale.

IX.

That on or about March 25, 1935, said H. F. Metcalf duly qualified as such Receiver and went into possession of the property and assets of said Bankrupt Corporation, including the real property conveyed to said Security-First National Bank of Los Angeles, as trustee, as hereinabove found.

X.

That from time to time thereafter, and prior to the 12th day of January, 1937, said Bank made application to the above entitled court for leave to foreclose and sell that certain real property record title to which was held by it under the said trust No. D 7224. That the Court, over the objection of said Security-First National Bank of Los Angeles, continued said restraining order in full force and effect.

XI.

That subsequent to the 25th day of March, 1935, and prior to the adjudication of said F. P. Newport Corpora-

tion, Ltd. as a Bankrupt, extensive negotiations and conferences were had by and between the Security-First National Bank of Los Angeles, the Receiver and their respective counsel, and other interested parties, looking to, and in an effort to devise a method for the liquidation of the properties record title to which was held by said Bank under its trust hereinabove mentioned, and to obviate the necessity of litigation between said Bank and said Bankrupt Estate. That following these conferences and negotiations, an agreement in writing, bearing date of January 12, 1937, was made and executed by and between the Bankrupt Corporation, the said Bank and the said Receiver, which agreement was subsequently supplemented and modified.

XII.

That the said agreement, together with a supplement thereto and modifications thereof, was duly approved, ratified and confirmed [43] by this Court, and the above entitled Court. That thereafter an appeal from the order so approving and ratifying said agreement, supplement thereto and modifications thereof, was taken to the United States Circuit Court of Appeals (Ninth Circuit) which Court affirmed the said order. That a petition for a writ of certiorari to review the said order was filed with the Supreme Court of the United States and said petition was denied.

XIII.

That thereafter, on January 12, 1937, said F. P. Newport Corporation, Ltd. was duly *adjudicated* a bankrupt.

XIV.

That under date of March 18, 1937, H. F. Metcalf was duly appointed Trustee of said bankrupt estate, duly qualified as such Trustee and ever since said date has been

and now is in possession of the property and assets of the Bankrupt Corporation as such Trustee. That said agreement as supplemented and modified was duly signed by said H. F. Metcalf as Trustee in Bankruptcy under the order and direction of this Court.

XV.

That by the terms of said agreement as so supplemented and modified, it was stipulated, among other things, that the principal amount of the indebtedness due to said Security-First National Bank of Los Angeles amounted to \$1,304,918.77, and should be payable in installments as therein provided, and that all indebtedness due said Bank should be paid on or before September 7, 1940. That the said agreement, as modified, among other things, provides:

"That while the said Declaration of Trust No. D 7224 and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring that all bankruptcy funds be accounted for by [44] the Trustee and be disbursed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D 7224 and the agreement of January 12, 1937, as modified hereby.

"Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds

or moneys so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust shall, until the indebtedness due the Bank has been paid and except as hereinafter provided, be, while in his possession impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate. No provision of said agreement of January 12, 1937, or this supplement thereto is made or entered into, directly or indirectly, for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorney of any party in interest in this bankruptcy proceeding, for services [45] rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to any one whomsoever from the assets of this Bankrupt Estate, is, in accordance with the law, left entirely to the determination of the court having jurisdiction of this bankruptcy proceeding, unaffected by any provision, term or condition, express or implied, of said contract of January 12, 1937, or of this supplement thereto."

XVI.

That thereafter, and with the approval of this Court, said Trustee in Bankruptcy, and Security-First National Bank of Los Angeles as trustee under its said trust, and the Bankrupt, did on or about the 14th day of January, 1938, make and enter into a lease with the Universal Consolidated Oil Company, as Lessee, under and by the terms of which there was let to said Lessee a portion of the real property of said Bankrupt Estate, the title to which stands of record in the name of said Security-First National Bank of Los Angeles as trustee and as security for the obligation owing to said Bank, for the purpose of producing oil and gas from said property. Thereafter the Lessee discovered oil and gas on said property and has produced oil and gas therefrom in commercial paying quantities.

XVII.

That pursuant to said order of court approving said agreement, supplement and modifications, the oil and gas royalties received by said Trustee in Bankruptcy from Universal Consolidated Oil Company have been deposited in a special account carried in the name of the Trustee in Bankruptcy at the head office of Security-First National Bank of Los Angeles, Sixth and Spring Streets, Los Angeles, California. That oil and gas royalties including bonuses actually paid to the Trustee in Bankruptcy under the terms and provisions of said lease during the years 1938 and 1939 were paid to said Bank, with the consent of said Bank, by the Trustee in Bankruptcy on orders of this [46] court to cover taxes assessed against the properties record title to which was held by said Bank as trustee under its said trust, cost of engineering services for checking oil and gas pro-

duction on the property leased to said Universal Consolidated Oil Company, and to apply on account of interest and principal owing on the secured debt to said Bank.

XVIII.

That on July 22, 1940, Nat Rogan, as United States Collector of Internal Revenue for the Sixth Collection District of California, filed a claim in these proceedings on behalf of the United States of America in the amount of \$19,363.65 representing the amount of alleged deficiency in income tax determined by the Commissioner of Internal Revenue as owing by the Trustee in Bankruptcy and the bankrupt estate for the years 1938 and 1939. That objections to said claim were filed by the said Trustee in Bankruptcy and sustained by this Court. That, on appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed this Court and held that said H. F. Metcalf as such Trustee in Bankruptcy and said bankrupt estate were indebted to the United States of America for federal income tax as set forth in said claim. That, pursuant to said judgment of said Circuit Court of Appeals, the Honorable Paul J. McCormick as Judge of the above entitled Court made and signed an order in these proceedings on April 8, 1943, allowing said claim in full with interest as provided by law. That said claim has not nor has any part thereof been paid.

XIX.

That said Security-First National Bank of Los Angeles received during the years 1938 and 1939 a total of \$451,851.01 from oil and gas royalties paid to it by said Trustee in Bankruptcy, of which \$97,665.88 was applied by said Bank on interest owing to it, \$59,010.43 on taxes assessed against the properties record title to which stands in the name of said Bank as trustee under

its said trust, \$5,903.23 for expenses or cost of checking production of oil and gas, [47] and the balance of \$289,271.47 on the principal of the secured indebtedness owing to said Bank.

XX.

That the Commissioner of Internal Revenue determined that the net income on which said tax was assessed was \$87,066.42 for the calendar year 1938 and \$30,288.99 for the calendar year 1939.

XXI.

That said Trustee in Bankruptcy has not now, nor has he at any time had since the assessment of said tax, any funds with which to pay said tax unless oil and gas royalties paid to him under said lease with Universal Consolidated Oil Company can be used for the payment thereof. That said Security-First National Bank of Los Angeles claims and asserts that the whole of said oil and gas royalties must be paid to it without deduction.

XXII.

That said agreement of January 12, 1937, provides in part as follows:

"Disbursement of the Special Fund. Out of the Special fund, the Bank shall pay all taxes, assessments, insurance, interest and other charges and expenses of said Trust No. D 7224 not theretofore paid by the Trustee in Bankruptcy. After payment out of said Special Fund of all current interest, taxes, assessments and Trust Expense, and after first setting aside in said Special Fund a reserve sufficient to pay all interest, taxes, assessments and Trust Ex-

penses for one additional year, the remainder of the money in said Special Account shall be paid over to the Trustee in Bankruptcy.

* * * * *

"All income from oil, in the nature of bonuses, rentals and royalties from any of the properties held by the Bank in Trust, so paid to the Bank, shall be [48] placed by the Bank in a Special Oil Account.

"The funds in said Account shall be available to the Trustee in Bankruptcy for the purpose of making up any deficiency in the 'Special Fund,' to pay interest, taxes, assessments and expenses, as hereinabove provided, in order to obviate a default; provided, however, that all sums taken from said oil Account for such purpose shall be repaid to said Oil Account from moneys thereafter coming into Special Fund and not needed to pay other or additional interest, taxes, assessments, or expenses then due.

"Except as herein provided, all amounts in said account, shall be applied on September first and March first of each year, or on such other dates as shall be mutually agreed upon by the Trustee in Bankruptcy and the Bank, on the principal of said indebtedness and shall be considered as cash applied on the quotas of principal as hereinbefore set forth."

XXIII.

That said Trustee in Bankruptcy now has on deposit in said special account carried in his name at said head office of Security-First National Bank of Los Angeles the Proceeds of oil and gas royalties received by him from Universal Consolidated Oil Company amounting to approximately \$21,000.

XXIV.

That said Trustee in Bankruptcy now has on deposit in a special account carried in his name as said Trustee at the head office of Citizens National Trust & Savings Bank of Los Angeles, Fifth and Spring Streets, Los Angeles, funds representing surface rentals of \$1495.02 received from tenants of portions of the properties record title to which is held by Security-First National Bank of Los Angeles as trustee under its trust D 7224. [49]

From the Foregoing Findings of Fact, the Court Concludes:

Conclusions of Law

1. That the income tax for the calendar years 1938 and 1939 hereinbefore referred to was the result of the production of income the full benefit and enjoyment of which was had by Security-First National Bank of Los Angeles.
2. That the properties record title to which is held by said Bank under its trust D-7224 as security for the obligation owing to said Bank by the Bankrupt have been administered by said Trustee in Bankruptcy by and with the consent and approval of said Bank and for the benefit of said Bank.
3. That the income taxes for the years 1938 and 1939 are incidental to said administration and a necessary part of the expense of operating, preserving, collecting and liquidating the properties and distributing the proceeds thereof.
4. That Security-First National Bank of Los Angeles, having had the full benefit of the income which resulted in the assessment of said taxes, should pay the taxes out of that income for said taxes are a necessary cost of producing said income.

5. That by the provisions of said agreement of January 12, 1937, as supplemented and modified, the oil and gas royalties received from Universal Consolidated Oil Company can be used for the purposes of paying taxes including income taxes assessed against the Trustee in Bankruptcy and the bankrupt estate herein.

6. That said claim of United States of America and the Collector of Internal Revenue for said income taxes should be paid by the Trustee in Bankruptcy herein out of the special accounts of said Trustee in Bankruptcy with said Security-First National Bank of Los Angeles and with said Citizens National Trust & Savings Bank of Los Angeles, and if said funds now on deposit in said special accounts are insufficient to pay said taxes in full and interest thereon, such deficiency should be paid by the Trustee in Bankruptcy out of oil and [50] gas royalties when and as received by him from Universal Consolidated Oil Company.

7. That since the funds now on deposit in said special accounts of said Trustee in Bankruptcy appear to be insufficient to pay said income taxes in full and interest, it is not necessary for this Court at this time to determine whether oil and gas royalties paid to the Trustee in Bankruptcy herein under said oil and gas lease with Universal Consolidated Oil Company or surface rentals received by the Trustee in Bankruptcy from tenants of the property record title to which is held by said Bank as trustee under its said trust D-7224 may be used to pay expenses of administration other than said income taxes.

Order

Now, Therefore, Good Cause Appearing, It Is Hereby Ordered:

(a) That the Trustee in Bankruptcy be and he is hereby directed and ordered to pay said Collector of In-

ternal Revenue the said income taxes assessed for the calendar years 1938 and 1939, and interest thereon as provided by law, out of oil and gas royalties received or to be received by the Trustee in Bankruptcy herein from properties record title to which stands in the name of Security-First National Bank of Los Angeles as trustee under its trust D-7224 and/or surface rentals received therefrom, and, for the purpose of making said payments, said Trustee in Bankruptcy may use any funds now on deposit in the special accounts carried in his name as said Trustee in Bankruptcy herein at the head offices of Security-First National Bank, Sixth and Spring Streets, Los Angeles, California, and Citizens National Trust & Savings Bank, Fifth and Spring Streets, Los Angeles, California.

(b) That, on application of Security-First National Bank of Los Angeles, payment of said taxes out of said funds is hereby stayed until five (5) days from and after final determination of any review of this order duly prosecuted by said Bank as provided by law. [51]

(c) The petition and prayer of Security-First National Bank of Los Angeles that said Trustee in Bankruptcy be required to pay over to said Bank the said oil and gas royalties and surface rentals on deposit in said special accounts of said Trustee in Bankruptcy is hereby denied without prejudice to said Bank to renew its application or prayer on appropriate pleadings when it is made to appear that said Trustee in Bankruptcy has in his possession or on deposit in said special accounts or either of them funds in excess of the amount required to pay income taxes.

The Court Makes No Determination at This Time as to Whether or Not Oil and Gas Royalties Paid or to Be Paid to the Trustee in Bankruptcy Herein Under the

Lease With Universal Consolidated Oil Company or Surface Rentals Received or to Be Received by Said Trustee in Bankruptcy From Tenants of Any of the Properties Record Title to Which Is Held by Security-First National Bank of Los Angeles as Trustee Under Its Trust D-7224 Can Be Used for the Purpose of Paying Expenses of Administration Other Than Said Income Taxes.

Dated this 6 day of June, 1944.

ERNEST R. UTLEY

Referee in Bankruptcy.

Approved as to Form:

EDMUND NELSON

Attorney for Bank of America, etc.

L. M. CAHILL

Attorney for the Bankrupt

CHARLES H. CARR,

United States Attorney,

E. H. MITCHELL,

Assistant United States Attorney, and
EUGENE HARPOLE,

Special Attorney, Bureau of Internal Revenue

By Eugene Harpole

BAILIE, TURNER & LAKE

By Allen T. Lynch

Attorneys for H. F. Metcalf, as Trustee in
Bankruptcy herein. [52]

June 2nd, 1944. Receipt of copy of within findings and order is hereby acknowledged. W. C. Shelton, Atty. for Security-First National Bank of Los Angeles.

[Endorsed]: Filed Jun. 6, 1944 at min. past 9 o'clock a. m. Ernest R. Utley, Referee; R Clerk.

[Endorsed]: Filed Oct. 18, 1944. [53]

[SECURITY-FIRST NATIONAL BANK'S
EXHIBIT 5.]

Copy

Law Offices
BAILIE, TURNER & LAKE
811 Citizens National Bank Building
Los Angeles, California

December 12, 1941

In Re: F. P. Newport Corporation,
Ltd., a corporation, Bankrupt.

Security-First National Bank of Los Angeles,
Sixth and Spring Streets,
Los Angeles, California.

Gentlemen: Attention: Mr. Russell Adams.

Referring to that certain petition entitled "Petition for Authority to Sell, and For Confirmation of Sale of Real Estate to John Drew," a copy of which has heretofore been handed to you and to which petition reference is hereby made for further particulars, the undersigned, in consideration of your agreement as expressed in said petition to release or pay to the Trustee in Bankruptcy twenty per cent (20%) of the purchase price of the property described in said petition for the purposes therein set forth, hereby jointly and severally waive and release any and all rights, if any they may have, to insist that their fees as counsel for the Trustee in Bankruptcy, or any part thereof, be paid out of royalties received or to be received from Universal Consolidated Oil Company under the lease heretofore made and entered into by and between yourselves, the bankrupt and the Trustee in

Bankruptcy, as lessors, and said Universal Consolidated Oil Company, as lessee, and approved by the bankruptcy court.

The foregoing agreement shall be effective only while the indebtedness or any part thereof owing you and referred to in the agreement of January 12, 1937, remains unpaid.

Very truly yours,

BAILIE, TURNER & LAKE

By Norman A. Bailie (signed)

By Richard A. Turner (signed)

By Frederick W. Lake (signed)

RE No. 25308-M. F. P. Newport Corporation, Ltd., Bankrupt. U. S. Govt. vs. Trustee and Re Petition to Security-First National Bank Re Foreclosure. Exhibit No. 5. Filed 11-23 1943. Ernest R. Utley, Referee. [R] [228]

In the *Superior* Court of the United States

Southern District of California

Central Division

No. 25-308-M

In the Matter of

F. P. Newport Corporation, Ltd., a corporation,
Bankrupt.

ORDER EXTENDING TIME TO FILE PETITION
FOR REVIEW

Good Cause having been shown in the premises, the time limit to file a Petition for Review by the Security-First National Bank of Los Angeles from those certain

Findings of Fact and Conclusions of Law and Order re Payment of Federal Income Taxes for the calendar years of 1938 and 1939, the same being dated June 6th, 1944, is hereby extended for an additional period of thirty days, to and including the 15 day of July, 1944.

Dated: June 9, 1944.

ERNEST R. UTLEY

Referee in Bankruptcy

[Endorsed]: Filed Jun. 9, 1944 at min past 10 o'clock a. m. Ernest R. Utley, Referee; K Clerk.

[Endorsed]: Filed Oct. 18, 1944. [54]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER

Comes now the Security-First National Bank of Los Angeles, a national banking association, and files this, its Petition for Review of that certain Order made by Referee in Bankruptcy, Ernest R. Utley, Esq., and entered in the above entitled proceedings on the 6th day of June, 1944, ordering H. F. Metcalf, Trustee in Bankruptcy for the above named Bankrupt, to pay to the Collector of Internal Revenue income taxes assessed for the calendar years 1938 and 1939, and interest thereon, out of oil and gas royalties received or to be received by the Trustee in Bankruptcy from property, the record title to which stands in the name of Security-First National Bank of Los Angeles as Trustee under its Trust D 7224, and/or surface rentals received therefrom, which order further

provided, for the purpose of making said payments, that said Trustee in Bankruptcy may use any funds now on deposit in the Special Accounts carried in his name as said Trustee in Bankruptcy at the Security-First National Bank of Los Angeles and the Citizens National Trust & Savings Bank.

Said Order is contained in the files and records of the within matter, and is incorporated herein by reference, and made a [55] part hereof as though set out in full.

In this Petition for Review the Security-First National Bank of Los Angeles alleges that the Referee in Bankruptcy erred in his said Order of June 6, 1944, in the following respects:

I.

That the Referee in Bankruptcy erred in ordering H. F. Metcalf, Trustee in Bankruptcy for the above named Bankrupt, to pay to the Collector of Internal Revenue of the United States the income taxes assessed for the calendar years 1938 and 1939, and interest thereon out of oil and gas royalties and surface rentals received or to be received by the said Trustee in Bankruptcy from properties, the record title to which stands in the name of Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, for the reason that under and by virtue of that certain Contract of January 12, 1937, as supplemented and modified, between the Security-First National Bank of Los Angeles, F. P. Newport Corporation, Ltd., and H. F. Metcalf as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., a Bankrupt, the said oil and gas royalties and surface rentals received or to be received by the said Trustee in Bankruptcy were sequestered for the payment of the indebtedness of said

Bankrupt Corporation to the Security-First National Bank of Los Angeles, the same being in excess of \$600,-000.00 as of the date of said order, free of any recourse thereto by the Trustee in Bankruptcy for the payment of any costs and expenses incurred by him as such Trustee, and free of any claims thereto by any creditor of said Trustee in Bankruptcy, including the Collector of Internal Revenue and the United States Government for income taxes, and free of any General Creditor's claims in the Bankruptcy proceedings.

II.

That the Referee in Bankruptcy erred in ordering H. F. Metcalf, Trustee in Bankruptcy for the above named Bankrupt, for the purpose of making said payment of income taxes for the calendar years 1938 and 1939, and interest thereon, to use any funds on deposit in the [56] special accounts carried in his name as said Trustee in Bankruptcy at the head office of the Security-First National Bank of Los Angeles, Sixth and Spring Streets, Los Angeles, California, and Citizens National Trust & Savings Bank, Los Angeles, California, for the reason that under and by virtue of that certain Contract of January 12, 1937, as supplemented and modified, said special accounts comprised and consisted only of the rents, issues and profits received or to be received by the said Trustee in Bankruptcy from properties, the record title to which stood in the name of Security-First National Bank of Los Angeles as Trustee under its Trust D 7224, and which amounts were sequestered for the payment of the indebtedness due from F. P. Newport Corporation, Ltd., to the Security-First National Bank of Los Angeles.

III.

That the Referee in Bankruptcy erred in denying the Petition and Prayer of Security-First National Bank of Los Angeles that said Trustee in Bankruptcy be required to pay over to the said Bank the oil and gas royalties and surface rentals received, or to be received by the said Trustee in Bankruptcy from the properties the record title to which stands in the name of said Bank as Trustee under its Trust D 7224, for the reason that under and by virtue of said Contract of January 12, 1937, as supplemented and modified, the said oil and gas royalties and surface rentals received or to be received by said Trustee in Bankruptcy from said properties were sequestered for the payment of the indebtedness due from said Bankrupt corporation to the Security-First National Bank of Los Angeles.

IV.

That the Referee in Bankruptcy erred in holding that any of the oil and gas royalties and surface rentals received or to be received by said Trustee in Bankruptcy from any of the properties, the record title to which is held by Security-First National Bank of Los Angeles as Trustee under its Trust D 7224, can be used for the [57] purposes of administration of the Bankrupt Estate of F. P. Newport Corporation, Ltd., so far as they relate to the payment of Federal Income taxes for the calendar years 1938 and 1939, and interest thereon, for the reason that under said contract of January 12, 1937, as supplemented and modified, said funds were sequestered for the payment of the indebtedness due from said Bankrupt Corporation to the Security-First National Bank of Los Angeles.

V.

That the Referee in Bankruptcy erred in holding that as to the Security-First National Bank of Los Angeles, the said Trustee in Bankruptcy was, during the calendar years of 1938 and 1939, operating property of said Bankrupt, the record title to which is held by the Security-First National Bank of Los Angeles, within the meaning of Section 52 (a) of the Revenue Code, and Section 19.52-2 of Treasury Regulations 103, since the said Trustee in Bankruptcy's operation thereof was for liquidation purposes and as limited by said Contract of January 12, 1937, as supplemented and modified.

VI.

That the Referee in Bankruptcy erred in holding that the net income received by said Trustee in Bankruptcy during the calendar years 1938 and 1939, respectively, from properties, the record title to which is held by Security-First National Bank of Los Angeles under its Trust D 7224, under and by virtue of said contract of January 12, 1937, as supplemented and modified, was subject to Federal Income tax within the meaning of Section 52 (a) of the Revenue Act of 1938, and of the Internal Revenue code, for the reason that under the provisions of said contract, as supplemented and modified, the said net income was sequestered for the payment of indebtedness owed by the Bankrupt Corporation to the Security-First National Bank of Los Angeles.

VII.

That the Referee in Bankruptcy erred in holding that the properties, the record title to which is held by the Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, and [58] as security for the obligation owed by the Bankrupt Corporation to said Bank,

have been administered by said Trustee in Bankruptcy by and with the consent and approval of said Bank, and for the benefit of said Bank, for the reason that said Trustee in Bankruptcy's possession of said properties are for liquidation purposes only, as provided by the said Contract of January 12, 1937, as supplemented and modified.

VIII.

That the Referee in Bankruptcy erred in holding that the income tax for the calendar years 1938 and 1939 was the result of the production of income, the full benefit and enjoyment of which was held by the Security-First National Bank of Los Angeles, for the reason that the income tax was levied against the said Trustee in Bankruptcy and not against the said Security-First National Bank of Los Angeles, and for the further reason that said income tax, by virtue of said Contract of January 12, 1937, as supplemented and modified, cannot be charged against oil and gas royalties and surface rentals received or to be received from properties, the record title to which is held by the said Bank.

IX.

That the Referee in Bankruptcy erred in holding that the income taxes for the years 1938 and 1939 are incidental to said Bankruptcy administration, and a necessary part of the expense of operating, preserving, collecting and liquidating the properties and distributing the proceeds thereof, insofar as said Security-First National Bank of Los Angeles is concerned, for the reason that under the provisions of said Contract of January 12, 1937, as supplemented and modified, all of the oil and gas royalties and surface rentals received and to be received by said Trustee in Bankruptcy, which includes all sums in the special bank accounts standing in the name of said

Trustee in Bankruptcy, from properties the record title to which is held by the Security-First National Bank of Los Angeles, were sequestered for the payment of the indebtedness owed by said Bankrupt to said Bank. [59]

X.

That the Referee in Bankruptcy erred in holding that Security-First National Bank of Los Angeles, having the full benefit of the income which resulted in the assessment of said taxes, should pay the taxes out of that income, for the reason that the tax assessed for the years 1938 and 1939 were assessed against the said Trustee in Bankruptcy and for his operations, and not against said Security-First National Bank of Los Angeles.

XI.

That the Referee in Bankruptcy erred in holding that by the provisions of said Agreement of January 12, 1937, as supplemented and modified, the oil and gas royalties received from Universal Consolidated Oil Company, lessee of property, the title to which stands in the name of Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, can be used for the purpose of paying income taxes assessed against the Trustee in Bankruptcy and the Bankrupt Estate, for the reason that said contract, as supplemented and modified, provides that such income is sequestered for the benefit of the Security-First National Bank of Los Angeles, to be applied by said Bank on the indebtedness due it from said Bankrupt corporation.

XII.

That the Referee in Bankruptcy erred in holding that if the funds on deposit in said special bank accounts, which comprises income collected from properties the title

to which stands in the name of the Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, are insufficient to pay said claim of the United States of America and the Collector of Internal Revenue for income taxes for the calendar years 1938 and 1939, plus interest thereon, such deficiency should be paid by the Trustee in Bankruptcy, out of oil and gas royalties when and as received by him from Universal Consolidated Oil Company, for the reason that such rents, issues and profits, by virtue of the provisions of said contract of January 12, 1937, as supplemented and modified, were sequestered for the payment [60] of the indebtedness due from said Bankrupt to the Security-First National Bank of Los Angeles.

That the points to be determined in connection with the Petition of the Security-First National Bank of Los Angeles to review that certain Order made by the Referee in Bankruptcy, Ernest R. Utley, Esq., and entered in the above entitled proceedings on the 6th day of June, 1944, are as follows:

I.

Whether or not, under the provisions of Trust D 7224 of the Security-First National Bank of Los Angeles, and that certain contract of January 12, 1937, as supplemented and modified, any portion of the oil and gas royalties and surface rentals received, or to be received, by the said Trustee in Bankruptcy from properties, the subject matter of said Trust and Contract, as supplemented and modified, the record title to which stands in the name of Security-First National Bank of Los Angeles as Trustee under its Trust D 7224, can be used for the payment of income taxes assessed against the Trustee in Bankruptcy for the calendar years 1938 and 1939, or whether

the use of such rents, issues and profits is applicable only to payment on account of the indebtedness due from said Bankrupt Corporation to said Bank.

II.

Whether or not the Security-First National Bank of Los Angeles can be deprived of a part of its security without its consent, for the purpose of payment of Federal Income taxes assessed against the Trustee in Bankruptcy for the calendar years 1938 and 1939.

III.

Whether or not a referee in bankruptcy has any jurisdiction to charge the Security-First National Bank of Los Angeles, a secured creditor, or any of its security, and without its consent, with any portion of the Trustee's expenses of administration so far as they [61] relate to the payment of Federal Income Taxes assessed against the Trustee in Bankruptcy of said Bankrupt.

The general outline of the evidence, upon which the said order of Referee Utley of June 6, 1944, is predicated, is as follows:

That on September 24, 1943, there was filed in the above Bankruptcy Proceedings by the United States of America a Petition for Order to Show Cause why the Trustee in Bankruptcy should not be directed to pay 1938 and 1939, Federal Income Taxes and interest thereon. On the filing of said Petition an Order to Show Cause was issued by the said Bankruptcy Court directed to H. F. Metcalf as Trustee in Bankruptcy for F. P. Newport Corporation, Ltd., and Security-First National Bank of Los Angeles, a secured creditor of said Bankrupt, directing them and each of them to appear before this Court on September 30, 1943, then and there to show cause, if

any they had, why an order should not be made therein directing the Trustee to pay the 1938 and 1939 Federal Income taxes and interest thereon, from the funds or income of the above entitled bankrupt estate. Answers to said Petition and Order to Show Cause were filed by the said Trustee in Bankruptcy and said Security-First National Bank of Los Angeles. Copies of said Petition, Order to Show Cause and said Answers are on file in the above entitled proceedings, and are incorporated in this Petition by reference, the same as though fully set out herein. That the said matter came on for hearing before said Bankruptcy Court on September 30, 1943, and was thereupon and from time to time thereafter continued to November 23, 1943.

On October 19, 1943, there was filed in the above bankruptcy proceedings by the Security-First National Bank of Los Angeles a Petition for an Order to Show Cause why the Trustee in Bankruptcy should not be directed to pay to said Security-First National Bank of Los Angeles impounded oil royalties, rents, issues and profits received by the said Trustee in Bankruptcy from properties, the record title to which stands in the name of said Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, [62] to be applied on the secured indebtedness of said Bank, under and pursuant to the terms and provisions of said Trust D 7224 and that certain Contract of January 12, 1937, as supplemented and modified, being between the Security-First National Bank of Los Angeles, F. P. Newport Corporation, Ltd., and H. F. Metcalf, as Trustee in Bankruptcy of the F. P. Newport Corporation, Ltd., and duly approved by the said Bankruptcy Court. On the filing of said Petition, an Order to Show Cause was issued by the said

Bankruptcy Court directed to H. F. Metcalf, as Trustee in Bankruptcy herein, directing him to appear before this Court on October 28, 1943, then and there to show cause, if any he had, why an order should not be made therein, granting the prayer of said Bank's Petition. Answers to said Petition and Order to Show Cause were filed by said Trustee. Copies of said Petition, Order to Show Cause and Answer of said Trustee in Bankruptcy, Contract of January 12, 1937, as supplemented and modified, are on file in the above entitled proceedings, and are incorporated in this Petition by reference, the same as though set out here in full.

That said matter came on for hearing before said Bankruptcy Court on October 28, 1943, and was thereupon, and from time to time thereafter continued to November 23, 1943.

On November 23, 1943, the said Petition of the United States of America and the said Petition of the Security-First National Bank of Los Angeles and the said answers thereto came on for hearing before Referee in Bankruptcy, Ernest R. Utley, Esq.

The following documents were admitted in evidence (copies of said documents are in the records and files of the above entitled matter, and are incorporated herein by reference as though fully set out herein):

U. S. Government's Exhibit No. 1,

Agreement of January 12, 1937, by reference
Modification of Supplemental Agreement dated
October 31, 1937; Stipulation of October 13,
1937; and Stipulation of October 9, 1937. [63]

U. S. Government's Exhibit No. 2—

By reference, Opinion of Circuit Court of Appeals in connection with the United States Tax claims.

U. S. Government's Exhibit No. 3—

Judge McCormick's Order pursuant to Mandate of Circuit Court of April 8, 1943, by reference.

Trustee in Bankruptcy's Exhibit No. A—

By reference, all Petitions and Orders of the Trustee regarding the payment of funds to the Security-First National Bank of Los Angeles.

Trustee in Bankruptcy's Exhibit No. B—

By reference, reports and accounts of Trustee, First, Second and Third.

Trustee in Bankruptcy's Exhibit No. C—

By reference, oil and gas lease between the Trustee and Universal Consolidated Oil Co., dated January 14, 1938.

Trustee in Bankruptcy's Exhibit No. D—

By reference, all orders re payment of administration expense.

Security-First National Bank of Los Angeles, Exhibit No. 1—

By reference, Declaration of Trust D 7224.

Security-First National Bank of Los Angeles' Exhibit No. 2—

By reference, Findings and Order of Referee Utley, and Order of Judge McCormick, approving said Contract of January 12, 1937, as supplemented and modified.

Security-First National Bank of Los Angeles' Exhibit No. 3—

By reference, Decision of 9th Circuit Court of Appeals, to be found in 98 Federal 2nd, 453.

Security-First National Bank of Los Angeles Exhibit No. 4—

Letter dated July 30, 1943, to H. F. Metcalf, Trustee. [64]

Security-First National Bank of Los Angeles' Exhibit No. 5—

Letter dated December 12, 1941, to Security-First National Bank of Los Angeles from Bailie, Turner and Lake.

The matter was submitted to the Referee for decision on the 23rd day of November, 1943.

On the 6th day of June, 1944, the Referee signed and filed his Findings of Fact, Conclusions of Law and Order re Payment of Federal Income Taxes for the calendar years 1938 and 1939. Said Findings of Fact, Conclusions of Law and Order are contained in the files and records of the above entitled proceedings, and are incorporated herein by reference and made a part hereof the same as though set out in full.

That on June 9, 1944, Referee Ernest R. Utley signed an Order extending time of the Security-First National Bank to file its Petition for Review of the said Order of June 6, 1944, for an additional period of thirty days, to and including the 15th day of July, 1944. Said Order is contained in the files and records of the above entitled

proceedings, and is incorporated herein by reference and made a part hereof the same as though set out in full.

That a copy of the transcript of the evidence will be forwarded to the District Court, in connection with the Referee's Certificate and as a part of his record.

Wherefore, your petitioner prays that said Order of June 6, 1944, be reviewed and reversed, and that the Trustee in Bankruptcy be directed to pay all sums held in said special bank accounts and comprising rents, issues and profits collected and to be collected from properties, the record title to which is held by Security-First National Bank of Los Angeles, as prayed for in said Petition of said Security-First National Bank of Los Angeles.

Dated: July 11, 1944.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

By R. T. ADAMS

Assistant Vice-President

Petitioner

W. C. SHELTON & GEORGE W. BURCH

By W. C. SHELTON

Attorneys for Petitioner [65]

[Verified July 11, 1944.] [66]

Received copy of the within Petition this 12 day of July, 1944. Edmund Nelson, Attorney for Bank of America.

Received copy of the within Petition this 12 day of July, 1944. Craig & Weller, Attorneys for Certain Creditors.

Received copy of the within Petition this 12th day of July, 1944. L. M. Cahill, by D. Poe, Attorney for F. P. Newport Corporation, Ltd.

Received copy of the within Petition this 12 day of July, 1944. Hiram E. Casey, Attorney for Certain Creditors.

Received copy of the within Petition this 12 day of July, 1944. Bailie, Turner & Lake, by F. C. G., Attorneys for H. F. Metcalf, Trustee in Bankruptcy.

Received copy of the within Petition this 12th day of July, 1944. Nourse & Jones, Paul Nourse, Attorney for Certain Creditors.

Received copy of the within Petition this 14th day of July, 1944. Charles H. Carr, E. H., United States Attorney; Eugene Harpole, Special Attorney; Attorneys for United States.

[Endorsed]: Filed Jul. 14, 1944, at 35 min. past 9 o'clock a. m. Ernest R. Utley, Referee; R, Clerk.

[Endorsed]: Filed Oct. 18, 1944. [67]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Paul J. McCormick, Judge of the United States District Court, Southern District of California, Central Division.

I, Ernest R. Utley, Referee in Bankruptcy to whom the proceedings in this matter were referred, do hereby certify:

That on January 12, 1937, F. P. Newport Corporation, Ltd., a corporation, was duly adjudicated a bankrupt and that proceedings in relation to said bankruptcy estate were duly referred to this Referee.

That on March 18, 1937, H. F. Metcalf was duly appointed Trustee in Bankruptcy of said bankrupt estate, duly qualified as such, and ever since has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy of said estate, and that ever since said date, and as said Trustee, said H. F. Metcalf has been in possession and control of all of the properties and assets of said estate, including those hereinafter more specifically referred to.

That on July 22, 1940, Nat Rogan, as the then United States Internal Revenue Collector of the Sixth Collection District of California, duly filed a claim in said proceedings on behalf of The United States of America for \$19,-363.65 asserting thereby that there was due and owing to The United States of America from and by said H. F. Metcalf as said Trustee in Bankruptcy the said amount as income tax determined [6] and assessed by the Commissioner of Internal Revenue for the taxable years 1938 and 1939 on what the Commissioner determined to have

been income of said H. F. Metcalf as said Trustee in Bankruptcy.

That on April 8, 1943, an order was signed in these proceedings by the Honorable Paul J. McCormick, as Judge of the above entitled Court, allowing said claim in full with interest thereon as provided by law; that said claim has not nor has any part thereof been paid.

That on September 24, 1943, there was filed in these proceedings by The United States of America a petition praying that an order be issued by this Court addressed to H. F. Metcalf as said Trustee in Bankruptcy and Security-First National Bank of Los Angeles, directing them to appear and show cause, if any they had, why the Trustee in Bankruptcy should not be ordered to pay said taxes with interest thereon; that said petition, among other things, set up the fact that said Bank claimed an interest in and to the right to receive all of the available funds of the above entitled bankrupt estate.

That on the filing of said petition an order to show cause was issued by the Referee directed to said Trustee in Bankruptcy and said Bank requiring them to appear before the Referee on September 30, 1943, then and there to show cause why an order should not be made and entered therein directing the said Trustee to pay said taxes. That said petition and order to show cause were duly served on said parties and answers thereto were filed by said Trustee in Bankruptcy and said Bank.

That the answer of said Trustee set up, among other things, that he had no funds with which to pay such tax unless he were permitted to use funds on deposit which represented royalties from Universal Consolidated Oil Company under an oil and gas lease hereinafter referred

to. That the answer of said Bank asserted, among other things, that the Bank had the first and prior right to receive from said bankrupt estate and said Trustee in Bankruptcy any and all funds on hand or which might thereafter come into possession of said Trustee as royalties under said oil and gas lease or rentals for any of the property of this estate, title to which property stands in the name of said Bank as security for payment of an obligation owing to it by the Bankrupt and prayed for an order directing the Trustee in Bankruptcy to pay to said Bank the said impounded oil and gas funds. [7]

That the hearing on said petition and order to show cause was continued from time-to-time until November 23, 1943, at which time the said matter came on regularly for hearing before said Referee. Oral and documentary evidence was offered and received and a brief summary of said evidence is as follows:

That on or about March 1, 1930, the bankrupt corporation borrowed from Security-First National Bank of Los Angeles the sum of \$760,000 which is the same debt as that mentioned in the contract of January 12, 1937, more particularly hereinafter mentioned including accretions thereto by way of accumulated interest, added borrowings, advances for taxes, the Bank's trustee fees, and the expenses of said Bank as such trustee.

That on or about March 1, 1930, said bankrupt corporation conveyed to said Security-First National Bank of Los Angeles title to certain real property by four (4) grant deeds. That concurrently with the execution of said deeds the said Bank executed and delivered to the bankrupt corporation a written declaration of trust dated March 1, 1930, now known and referred to as Trust D-7224 (formerly SS 70401), by the terms of which it

acknowledged that it had received the conveyance of said property as Trustee with power of sale and as security for the payment of said loan and as security for all advances, costs, trustee's fees and expenses advanced and incurred under the terms of said declaration of trust.

That thereafter and prior to the adjudication in bankruptcy additional properties were transferred by said bankrupt corporation to said Bank as such Trustee under and pursuant to the terms of said declaration of trust. The property so transferred to said Bank, record title to which is now held by it under and pursuant to the terms of said declaration of trust, consists of parcels the bulk of which are unsubdivided and are situate mostly in the County of Los Angeles and include nine acres herein-after more specifically referred to and situate on what is known as Channel No. 3 of the Long Beach Harbor. That said Trustee in Bankruptcy, on his qualification as such Trustee, came into possession of all of the properties of said bankrupt estate including the properties, record title to which was held by said Bank as above noted.

That said declaration No. D-7224 provided, among other things, as follows:

"Article Sixteenth: All proceeds and avails arising from the [8] rents, issues, leases and sales of the Trust property, or otherwise, shall be paid to and received by the said Trustee, and said Trustee shall disburse all such proceeds and avails as follows:"

* * * * * *

"III. All proceeds and avails arising from the leases and rentals of said property so received by the said Trustee shall be credited to the General Fund."

* * * * * *

"VII. Out of the moneys credited to the General Fund the Trustee shall pay:

1st: Its accrued costs, fees and expenses as hereinafter determined, unless they be sooner paid;

2nd: The taxes, assessments and installments of principal and interest on street bonds assessed or imposed on or against said property then due and unpaid, not payable by the purchaser thereof from the said Trustee.

"Should the moneys in the hands of the Trustee available for that purpose be insufficient to pay said taxes and assessments, and installments of the principal and interest on the street bonds when due, then the Beneficiary by its ratification of this Declaration of Trust, covenants and agrees to immediately pay any deficiency in the amount due on said taxes, assessments and bonds to the Trustee.

"3rd: Any improvements upon the Trust property, upon the order of the Beneficiary hereunder, or its duly authorized Agent, and/or as contracted by the Trustee as provided for in Article Fourteenth hereof;

"4th: Interest, as and when due, on any note secured hereby, if there are not sufficient moneys in the Interest Fund with which to pay the same;

"5th: Any liens or incumbrances covering the property sold, not payable by the purchaser thereof from said Trustee;

"6th: Principal upon any note secured hereby in favor of the Payee after the due date thereof; and [9]

"7th: Subject to the foregoing provisions, and provided the Beneficiary is not in default in any manner under the terms of this Declaration of Trust, all of the balance of the moneys received by the said

Trustee shall be applied, disbursed and paid in convenient monthly installments to F. P. Newport Corporation, Ltd., a Delaware Corporation, the Beneficiary hereunder, its successors or assigns."

That prior to the adjudication in bankruptcy of said F. P. Newport Corporation; the said Bank as trustee under its declaration of trust did, in accordance with the provisions of said declaration of trust, declare the entire unpaid principal balance on the obligation secured by said properties due and fixed the date for the foreclosure sale of said properties for March 29, 1935.

That on March 19, 1935, an involuntary petition was filed against the said Bankrupt corporation; that on or about March 25, 1935, H. F. Metcalf was duly appointed Receiver in Bankruptcy of all of the properties and assets of the above named corporation including the property record title to which was held by said Bank as hereinabove stated. That on the filing of said petition and the appointment and qualification of said Receiver, an Order was duly made in said proceeding restraining said Bank from proceeding with the foreclosure sale of said property. That from time to time thereafter and prior to January 12, 1937, the Bank made application to the Court for leave to foreclose. That the Court, over the objections of said Bank, continued the restraining order in full force and effect until the adjudication in bankruptcy as hereinbefore mentioned.

That subsequent to March 25, 1935, and prior to the adjudication in bankruptcy of said corporation, extensive negotiations and conferences were had between said Bank, said Receiver, and their respective counsel and other interested parties in an effort to devise a method for the liquidation of the properties record title to which was

held by said Bank pursuant to the terms of said Trust, and for an orderly and equitable payment of the indebtedness owing to said Bank. That following said conferences and negotiations an agreement in writing, dated January 12, 1937, was made and executed by said bankrupt corporation, the Bank and the Receiver, which agreement was subsequently executed by the Trustee in Bankruptcy and thereafter supplemented and modified in writing. That said agreement, supplement, and modifications [10] thereof were duly ratified and confirmed by the Honorable Paul J. McCormick, Judge of said District Court.

That thereafter an appeal from the order so approving and ratifying said agreement, supplement thereto and modifications thereof, was taken to the United States Circuit Court of Appeals (9th Circuit) which last mentioned Court duly affirmed the said order. That a petition for a Writ of Certiorari to review the said order was filed with the United States Supreme Court and was duly denied.

That by the terms of said agreement as so supplemented and modified, it was stipulated, among other things, that the principal amount of the indebtedness due to said Security-First National Bank of Los Angeles amounted to \$1,304,918.77, and should be payable in installments as therein provided, and that all indebtedness due said Bank should be paid on or before September 7, 1940. That the said agreement, as modified, among other things, provides:

"That while the said Declaration of Trust No. D-7224 and the contract of January 12, 1937 provide expressly that all moneys from Sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring

that all bankruptcy funds be accounted for by the Trustee and be disbursed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D-7224 and the agreement of January 12, 1937, as modified hereby.

"Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds or moneys so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust shall, until the indebtedness due the Bank has been paid and except as hereinafter provided, be, while in his possession impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and [11] such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate. No provision of said agreement of January 12, 1937, or this supplement thereto is made or entered into, directly or indirectly, for the purpose of fixing the amount of the fees or

other compensation to be paid to any party in interest or any attorneys of any party in interest in this bankruptcy proceeding, for services rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to any one whomsoever from the assets of this Bankrupt Estate, is, in accordance with the law, left entirely to the determination of the court having jurisdiction of this bankruptcy proceeding, unaffected by any provision, term or condition, express or implied, of said contract of January 12, 1937, or of this supplement thereto."

That thereafter and with the approval of this Court said Trustee in Bankruptcy and said Bank and Bankrupt as Lessors did on or about January 14, 1938, make and enter into a lease with the Universal Consolidated Oil Company as lessee under and by virtue of which there was let to said Lessee that portion of the real property record title to which stood in the name of said Bank and hereinbefore referred to as the 9-acre parcel situate on Channel No. 3 Long Beach Harbor for the purpose of producing oil and gas on said property. That the Lessee went upon said property, discovered oil and gas, and ever since has been producing oil and gas therefrom in commercial paying quantities. That the bonuses and oil and gas royalties payable under the terms of said lease have been paid to said Trustee in Bankruptcy and pursuant to order of the Court approving said agreement, supplement thereto and modifications thereof, have been deposited in a special account carried in the name of said Trustee in Bankruptcy at the Head Office of said Security-First National Bank [12] of Los Angeles. Thereafter the oil and gas royalties, including bonuses, actually paid to said Trus-

tee in Bankruptcy during the years 1938 and 1939 were paid to said Bank, with the consent of said Bank, by the Trustee in Bankruptcy on orders of this Court to cover: first, taxes assessed against the properties record title to which was held by said Bank as trustee under its said Trust; second, costs of engineering services for checking oil and gas production on the property so leased; third, to apply on account of interest; and fourth, to apply on account of principal owing on the secured debt to said Bank.

That said Security-First National Bank of Los Angeles received during the years 1938 and 1939 a total of \$451,851.01 from oil and gas royalties paid to it by said Trustee in Bankruptcy of which \$97,665.88 was applied by said Bank on interest owing to it, \$59,010.43 on taxes assessed against the properties record title to which stands in the name of said Bank as trustee under its said Trust, \$5,903.23 for expenses or cost of checking production of oil and gas and the balance of \$289,271.47 on the principal of the secured indebtedness owing to said Bank.

That the Commissioner of Internal Revenue determined that the Trustee had received during the calendar year 1938 the gross sum of \$259,578.93 of which \$50,000 represented bonuses received under said lease and \$195,517.65 represented oil and gas royalties. The Commissioner allowed expenses and deductions totaling \$172,512.51, leaving a net income as determined by the said Commissioner of \$87,066.42 for said calendar year 1938.

That the Commissioner of Internal Revenue determined that the Trustee had received during the calendar year

1939 the gross sum of \$232,571.40 of which \$206,333.36 represented oil and gas royalties received under said lease. The Commissioner allowed expenses and deductions of \$202,282.41 leaving, according to the Commissioner's determination, a net income for 1939 of \$30,288.99.

That the Trustee in Bankruptcy does not now have, nor has he had at any time since the assessment of said income tax, any funds with which to pay the said assessment unless he is authorized to pay it from the oil and gas royalties received by him under said lease with Universal Consolidated Oil Company.

That Security-First National Bank of Los Angeles asserts that the whole of said oil and gas royalties must be paid to it without deduction and that its right thereto [13] is superior to the right of the United States of America.

That said agreement of January 12, 1937, provides as follows:

"Disbursement of the Special Fund. Out of the Special Fund, the Bank shall pay all taxes, assessments, insurance, interest and other charges and expenses of said Trust No. D-7224 not theretofore paid by the Trustee in Bankruptcy. After payment out of said Special Fund of all current interest, taxes, assessments and Trust Expense, and after first setting aside in said Special Fund a reserve sufficient to pay all interest, taxes, assessments and Trust Expenses for one additional year, the remainder of the money in said Special Account shall be paid over to the Trustee in Bankruptcy."



"All income from oil, in the nature of bonuses, rentals and royalties from any of the properties held by the Bank in Trust, so paid to the Bank, shall be placed by the Bank in a Special Oil Account.

"The funds in said Account shall be available to the Trustee in Bankruptcy for the purpose of making up any deficiency in the 'Special Fund,' to pay interest, taxes, assessments and expenses, as hereinabove provided, in order to obviate a default; provided, however, that all sums taken from said Oil Account for such purpose shall be repaid to said Oil Account from moneys thereafter coming into Special Fund and not needed to pay other or additional interest, taxes, assessments, or expenses then due.

"Except as herein provided, all amounts in said account, shall be applied on September first and March first of each year, or on such other dates as shall be mutually agreed upon by the Trustee in Bankruptcy and the Bank, on the principal of said indebtedness and shall be considered as cash applied on the quotas of principal as hereinbefore set forth."

That said Trustee in Bankruptcy has on deposit in said special account at the Head Office of said Security-First National Bank of Los Angeles moneys received from said oil and gas royalties approximating \$21,000. That said Trustee in Bankruptcy also has on deposit in a special account carried in his name with the Head Office [14] of Citizens National Trust & Savings Bank of Los Angeles funds totaling \$1,495.02 which represent surface rentals collected by him from portions of the properties of this estate record title to which stands in the name

of said Bank as security for said obligation. That said Bank claims and asserts that it is entitled to receive said funds without deduction and that its right thereto is superior to any right the United States Government might have.

From the foregoing facts, the Referee determined that the income tax for the calendar years 1938 and 1939 was the result of income the full benefit and enjoyment of which was had by said Security-First National Bank of Los Angeles and that said income taxes are incident to the administration of this estate and a necessary part of the expenses of operating, preserving, collecting and liquidating the properties and distributing the proceeds thereof and that said Bank having had the full enjoyment of said income which resulted in the assessment of said tax should pay the same out of such income, since such taxes were part of the cost of producing that income; and that the Trustee should be directed to pay said taxes out of said oil and gas royalties or surface rentals.

The Referee determined that it was advisable to defer a determination of the question of whether or not said income could be used for the payment of any other expense of administration since the funds available are not sufficient to pay said taxes and accrued interest.

The Referee made Findings of Fact, Conclusions of Law, and Order directing that said taxes be paid by the Trustee in Bankruptcy out of said funds or other funds received from the same sources, which Findings, Conclusions and Order are dated June 6, 1944.

That a petition to review said order was regularly presented within the time allowed by law by Security-First National Bank of Los Angeles.

The Referee submits herewith the following instruments:

1. Original petition of the United States of America hereinbefore mentioned, and order to show cause thereon.
2. Answer of Security-First National Bank of Los Angeles and answer of the Trustee in Bankruptcy herein.
3. Findings of Fact, Conclusions of Law and Order of the Referee [15] dated June 6, 1944, entitled: Findings of Fact, Conclusions of Law, and Order re Payment of Federal Income Taxes for Calendar Years 1938 and 1939.
4. Order Extending Time to File Petition for Review.
5. Petition for Review of Referee's Order filed by Security-First National Bank of Los Angeles.
6. Transcript of the record in the matter of the United States of America, appellant, v. H. F. Metcalf, United States Circuit Court of Appeals No. 10130, which was received in evidence and marked as Exhibit for the purpose of introducing by reference the following:
 - (a) Findings of Fact, Conclusions of Law and Order Disallowing Claim of Collector of Internal Revenue, and Order Vacating and Setting Aside Prior Order Disallowing Claim of Collector of Internal Revenue (Tr. pp. 28-50 inclusive).

- (b) Agreement dated January 12, 1937 (Tr. pp. 61-78 inclusive).
 - (c) Supplement agreement (Tr. pp. 79-85, inclusive).
 - (d) Stipulation re modification of contract or agreement of January 12, 1937 (Tr. pp. 86-89, inclusive).
 - (e) Stipulation re modification of supplement agreement dated August 31, 1937 (Tr. pp. 89-94, inclusive).
 - (f) First Report and Account current of H. F. Metcalf, Trustee in Bankruptcy herein (Tr. pp. 94-110, inclusive).
 - (g) Second Report and Account Current of H. F. Metcalf, Trustee in Bankruptcy herein (Tr. 110-118, inclusive).
 - (h) Supplement to Second Report and Account Current of H. F. Metcalf, Trustee in Bankruptcy herein (Tr. 119-126, inclusive).
 - (i) Third Report and Account Current of H. F. Metcalf, Trustee in Bankruptcy herein (Tr. pp. 126-138, inclusive).
 - (j) Oil and Gas Lease (Tr. pp. 149-184, inclusive).
7. The Fourth, Fifth and Sixth Reports and Accounts Current of H. F. Metcalf, Trustee in Bankruptcy herein. [16]
8. Findings and order of Referee approving contract of January 12, 1937, as supplemented and modified. (The order of the Honorable Paul J. McCormick approving said contract, supplement and modifica-

tions is on file in the office of the Clerk of said Court and is not a part of this record of the Referee that can be transmitted with this certificate.)

9. Letter dated July 30, 1943, addressed to H. F. Metcalf, as Trustee, (Bank's Exhibit No. 4).
10. Letter dated December 12, 1941, addressed to Security-First National Bank of Los Angeles (Bank's Exhibit No. 5).
11. Copy of Trust No. D-7224. (See Transcript of Review, p. 178, Bank's Exhibit No. 6.)
12. Transcript of proceedings had before the Referee in this matter.

The orders of the Referee directing payment of oil and gas royalties to said Bank from time-to-time and allowing expenses of administration were introduced in this proceeding by reference. These orders are not attached as it appears no issue was made concerning them. If desired, they can be transmitted.

Dated this 18 day of Oct., 1944.

ERNEST R. UTLEY
Referee in Bankruptcy

[Endorsed]: Filed Oct. 18, 1944. [17.]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS IN RE: UNITED STATES
OF AMERICA VS. TRUSTEE.

Los Angeles, California. Tuesday, November 23,
1943. 10:00 o'clock A. M. session.

The Referee: We will take up the F. P. Newport matter. Which one of the three matters do you wish to take up first, gentlemen?

Mr. Nelson: Your Honor, please, I would like to file at this time an objection on behalf of the Bank of America as an unsecured creditor to the petition of the Security-First National Bank for leave to foreclose. I have served the petition on counsel for the Security-First National Bank and on counsel for the Trustee.

The Referee: Very well. It may be filed.

Mr. Cahill: At this time I desire to file objections to the petition for leave to foreclose, and answer of the bankrupt to said petition.

The Referee: It may be filed. Any other appearances in this matter other than Mr. Cahill and Mr. Nelson?

Mr. Casey: I appear on behalf of the creditors I represent as power of attorney and also the Los Angeles Investment Company. The power of attorney runs to Mr. Powell and Mr. Flint asked if I would make the appearance on his behalf. I join in the objection of the Bank of America to the petition.

Mr. Anderson: Your Honor please, I appear on behalf of Mrs. Cameron who is a creditor to the extent of some \$6,000. [3*] She is a resident of England and I have not heard from her but I desire to make an appearance in her behalf.

The Referee: Very well, Mr. Anderson.

Mr. Thompson: On behalf of the Main Street Company, E. W. Thompson for Paul Nourse, and we join in the objection to the petition to foreclose.

Mr. Keleher: On behalf of the creditors Craig and Weller represents, one of them the Los Angeles Times, I object to the granting of the petition for foreclosure in the interests of those creditors.

The Referee: You are appearing for the Security-First National Bank?

Mr. Shelton: Yes, and I desire to have the record show as associated with me George W. Burch.

The Referee: Mr. Lynch, you are here for the Trustee?

Mr. Lynch: Yes.

The Referee: And Mr. Harpole for the United States Government?

Mr. Harpole: I am here for the United States in connection with income taxes. I suppose that may be indirectly involved in the foreclosure proceeding.

The Referee: Do you wish to take that matter up before taking up the petition to foreclose?

Mr. Shelton: It is my suggestion the petition of the United States Government for the payment over of funds in liquidation of certain income taxes which have been litigated [4] between the Government and the Trustee

*Page number appearing at top of Reporter's Transcript.

and found to be due the Government, and the petition of the Security-First National Bank of Los Angeles for leave to foreclose and secondly for leave to pay over the impounded funds should be taken up concurrently and at the same time. We have all practically agreed, that is I think Mr. Lynch, Mr. Harpole and myself, that the matter will be submitted to your Honor on briefs and much of the evidence which goes to the validity of the claim of the United States Government for the payment out of these impounded funds in opposition to the secured creditor, the Security-First National Bank of Los Angeles, will involve the same evidence which will be directed toward its request to have the funds paid over to it, so that is my suggestion, that we introduce the evidence concurrently. I do not feel it calls for a long and protracted hearing for the introduction of evidence. Mr. Lynch's office has signed a stipulation as to certain of the basic facts in this matter and this proceeding of course is a proceeding directed against the Trustee in Bankruptcy as being the only party, and not against the general unsecured creditors. They are not parties to this proceeding other than by courtesy of the Court, and the same thing is true as to the petition for leave to foreclose. I do not think any of them are taking any part in the controversy between the United States of America and the bank, as to who is entitled to the proceeds of the oil lease in priority. [5]

The Referee: They might be interested in that question. I can conceive of a creditor being interested in knowing whether the unsecured claim of the bank would be paid or the United States Government be paid. Are there any of counsel who represent interests here interested in that question to such an extent you wish to enter an appearance in that matter on the question of the tax?

Mr. Nelson: I think we are interested in the solution or answer to that question. I have so alleged in the objection to the petition.

The Referee: Well, is it agreed between all of counsel these matters may be heard as one matter consolidated?

Mr. Shelton: We have never had any definite agreement on that but I think for the purposes of saving time it would be wise.

The Referee: I can appreciate Mr. Harpole's position in the event of a review, he might not wish to encumber the record or other matters than he is concerned with.

Mr. Harpole: That is so, and it might be there would be a review taken in the foreclosure proceeding and the Government wouldn't wish to be carried into that and it would be if it was consolidated for trial.

Mr. Nelson: On that point I have stated as an objection to the petition of the Security-First National Bank to foreclose that the conflict does exist between the Government [6] on the tax claim and the Security-First National Bank with reference to the right to have certain funds applied either for taxes or on the Security-First National Bank loan, and that that is a matter vital to the position of the Security-First National Bank because if certain revenues which have been applied and which prospectively may continue to be applied on its loan are subject to the tax lien that definitely affects the ability of the bankrupt to pay off the Security Bank lien. I think it is one of the matters to be determined before the Court grants any leave to foreclose or considers that matter, at least to the extent until we know what the tax determination is and who has the better right to the funds and we do not know what the ability of the estate to pay

off the lien of the bank is. It may be affected to the extent of two hundred thousand dollars.

Mr. Shelton: There is no question but what there is a controversy whether the Government or the bank is first paid, and we are in court insisting our petition be heard and we seek in the same petition the right to have this very money the Government is asking for to be paid over to us. There are two petitions before your Honor and there is a fund now I think of about \$16,000—

Mr. Lynch: \$28,000.

Mr. Shelton: The Government wants it and the Security-First National Bank wants it.

The Referee: One of your petitions is to pay over this [7] money and the other is the petition for leave to foreclose?

Mr. Shelton: That is right, in the same petition. First, for leave to foreclose and second, to pay over these impounded funds. So you cannot answer the bank's claim without answering the Government's claim, and to that extent they overlap but it does not seem to me there should be any great difficulty in the introduction of testimony. For instance, the records and files of this bankrupt which start from its very outset, and particularly commencing with the contract that was made in modification of the deed of trust, that is all part of the evidence in the Government proceeding as well as ours.

The Referee: Why not do this, Mr. Shelton? I don't know that the matter of the United States Government versus the Trustee and so forth is on the calendar but why not hear that, get the evidence in on that question and then take up the other?

Mr. Harpole: We will be just duplicating evidence. The same records and files that sustain our position for the United States Government sustains the position of the bank.

Mr. Anderson: Why not stipulate the evidence offered on the one question can be considered on the other, without repetition.

Mr. Nelson: We will agree to that.

The Referee: Mr. Harpole would not want to agree all evidence on the foreclosure angle might be considered as part of his. [8]

Mr. Nelson: No, but we could stipulate the other way around.

The Referee: Yes.

Mr. Lynch: As a practical matter the Court will find when we get into the introduction of testimony and evidence that practically all the evidence that will go in on the bank's matter will be relevant and be introduced on the petition of the Government.

Now, I want to call the Court's attention to one thing, and that is this that the bank has filed a petition not only to foreclose but a petition in which they ask the Trustee be directed to pay over to them certain oil funds now impounded in the oil account and certain additional funds which are not revenues from the Universal Consolidated Gas and Oil lease but revenues from this property, impounded in a separate account. The Government insists those very same funds be paid over to it, so necessarily the Court must determine the petition of the Government as to their right to obtain those funds along with and concurrently with the petition of the bank to obtain those very same funds, so it is to that extent that the cases are

identical, and I am inclined to believe the evidence introduced in one will be practically the same as on the other.

Mr. Harpole: With this difference, your Honor. The claim of the Government is here as an expense of administration in this bankruptcy case. The claim of the bank and [9] of the other creditors are, as far as I can tell from what has been said in the court room and from reading the petition I received, claims that are true claims, that is, they were debts due at the time the proceeding started.

Mr. Lynch: That makes no difference so far as the practical problem is concerned because we have no funds with which to pay the Government claim, that is, to pay this item of administration expense, namely the income tax, unless that can be paid out of the very fund the bank insists they have a prior right to receive. Necessarily the two must be concurrently determined.

Mr. Cahill: My analysis of the suggestion made by counsel for the Security-First National Bank is that in effect he proposes at this time the Court make an order in effect consolidating for trial two totally unrelated matters, and that being the conception on behalf of the bankrupt I must object; in objecting I desire to point out to your Honor we are going to have trouble and difficulty enough here on our defense to the objections to the petition to foreclose and we do not want to be involved in what to us at this time is a collateral matter, that is the matter between the Security-First National Bank and the Government as to where a portion of the funds of the bankrupt estate shall be disbursed. That matter while of extreme importance on the aspect that Mr. Nelson has indicated, that it might mean \$200,000 one way or the other to the bankrupt [10] estate is important, but who gets it

finally between the two parties is of little importance, other than the aspect I mentioned, to the bankrupt or unsecured creditors or I think to the Trustee. So for that reason I object and in objecting I point out to your Honor I think if the Court would make an order of consolidation I think the order would be legally improper.

The Referee: I can see a very good reason why in Mr. Harpole's matter, that is, the United States Government matter, he would not want to be involved in a record that might deal in matters in which he would not be interested on review. I think I will hear the matter of the United States Government versus the Trustee first and after that if counsel wishes to stipulate that some or all of that matter may be considered on the other matter very well; otherwise, certain portion of it that may be material will have to be offered later. We will proceed first in the United States of America versus Trustee.

Mr. Harpole: Does the Court wish a statement at this time?

The Referee: I think I am pretty fairly well familiar with the situation, Mr. Harpole. The Court is aware of the litigation on the tax question and the holding that the Trustee is liable and that the United States is entitled to tax his operations, and I think there was one claim presented there of some \$19,000 or thereabouts. [11]

Mr. Harpole: That is substantially the amount involved in the litigation.

The Referee: Yes. Now, I assume later that you have recorded a lien?

Mr. Harpole: I don't know. That is not a matter—

The Referee: That question does not arise?

Mr. Harpole: No.

The Referee: It is just a question of whether or not this tax should be paid out of the funds which the bank claims as an expense of administration. Is that the point?

Mr. Harpole: Of course, there is always a tax lien involved whether it is an assessed tax or not. We have secured claims here and unsecured creditors, but as I pointed out a minute ago this is an expense of administration.

The Referee: I think I am familiar enough with the facts generally that you may proceed with the proof, Mr. Harpole. If some matter does arise later I will feel at liberty to ask questions.

Mr. Harpole: I offer by reference from the files of this court that agreement that was entered into on January 12, 1937, between the Security-First National Bank of Los Angeles, the F. P. Newport Corporation, Limited, and H. F. Metcalf as Trustee in Bankruptcy of the F. P. Newport Corporation.

Mr. Lynch: May I interrupt you a moment? My understanding [12] is that agreement which was an exhibit in this case and on file in this court cannot now be located. It apparently is between here and the Circuit Court of Appeals. It has been misplaced, and I wonder under the circumstances if we should not use the transcript of the record in the United States of America versus Metcalf case, and introduce this agreement by reference.

The Referee: Since it was sent to the clerk what happened to it?

Mr. Lynch: They made an effort to find it but could not. However, I have two copies here of the transcript of the record which contain copies of those documents.

Mr. Shelton: Which transcript is that?

Mr. Lynch: United States of America, the tax case.

Mr. Shelton: I see. I am not familiar with that.

Mr. Lynch: I have the Circuit Court of Appeals number. 10130.

Mr. Shelton: Do you have an extra copy of that?

Mr. Lynch: Yes, I think I have another copy at the office besides these two.

Mr. Harpole: Whatever is the most convenient way of getting that in.

Mr. Lynch: We have extra copies here of the agreement if it is necessary to put them in.

The Referee: I will consider the agreement in evidence by reference, if there is no objection, and then we can [13] dispose of the form in which it should be presented to the Court, but I think the way the Court should consider it is in evidence by reference.

Mr. Lynch: Should we introduce this transcript of the record in this one case and then by reference we can refer to it. Then we will know we have got it.

Mr. Shelton: In the case taken up, the Neblett case, the transcript is complete with the contract, modification of the contract and stipulations modifying that.

Mr. Lynch: So is the other one.

Mr. Shelton: If this is complete I will not object to it.

The Referee: I better give that an exhibit number. That will be United States Government Exhibit 1 by reference.

Mr. Shelton: It will be understood in the offer of this document it is done for the purpose of placing in evidence the documentary evidence of the contract and its modifications?

Mr. Lynch: That is right.

Mr. Shelton: Is that satisfactory to you, Mr. Harpole?

Mr. Harpole: I was coming to the modification. I desire to offer the modification of August 31, 1937, between the same parties.

Mr. Lynch: That is a supplement.

Mr. Harpole: The supplemental agreement of August 31, 1937. And I offer the modifying stipulation of October 14, [14] 1937 and the modifying stipulation of October 29, 1937, both relating to the original agreement of January 12, 1937.

The Referee: I think all those may be considered in evidence by reference, if there is no objection.

Mr. Harpole: That is all of the direct evidence, plus the opinion of the Circuit Court of Appeals.

The Referee: Do you want to show you have some taxes due—unless that is conceded.

Mr. Lynch: That is conceded by the answer of the Trustee.

Mr. Harpole: I offer in evidence, in case it is not conceded, the opinion of the Circuit Court of Appeals of the Ninth Circuit, 131 Federal Second, 677, the case of the United States versus F. P. Newport Corporation, Limited, and H. F. Metcalf as Trustee of the estate of F. P. Newport Corporation, Limited, bankrupt.

Mr. Shelton: Now, to that offer in evidence, we have no objection to the introduction of that for the purpose of showing that the Government had a claim against the Trustee but we do object to it as not being binding in any way on the bank, who was not a party to that proceeding.

The Referee: Well, it may be received in evidence as Government's Exhibit 2 by reference for whatever purposes it may serve. It is a little bit difficult for the Court to determine at this time the extent.

Mr. Shelton: With the exception I gave I am perfectly [15] agreeable to have it in. It is not binding on the bank other than to show that the Trustee got,—that the Government got a judgment against the Trustee for income taxes for its operations.

Mr. Harpole: And I will also offer in evidence by reference the order of District Judge Paul J. McCormick, made on the 8th of April, 1943, pursuant to the mandate of the Circuit Court of Appeals of the Ninth Circuit.

Mr. Sheldon: To that offer I make the same objection, namely, that it is not binding on the Security Bank.

The Referee: That may be received by reference as U. S. Government's Exhibit number 3.

Mr. Harpole: That is all.

Mr. Lynch: I might point out to counsel there is no proof whatsoever that the Trustee has the money with which to pay it. Now, he seeks an order here directing the Trustee pay something, a tax, and it is incumbent upon him to show there are some funds available to pay it. I stated the Trustee has conceded all along and the Court has determined it is an expense of administration and that there is a tax liability, but here the United States Government comes along and files a petition and gets out an order to show cause directed to the Trustee why he should not pay it. There must be some showing the Trustee has the ability to pay it.

The Referee: Isn't that true, Mr. Harpole? [16]

Mr. Harpole: That is a matter that seems to me should require no proof. The files in this bankrupt proceeding, or accounts will show the funds on hand.

Mr. Lynch: They do not.

The Referee: It does not show there are funds on hand at the present date. It might show it as of the last report?

Mr. Shelton: That is one reason why I wanted the records and files brought in so all the accounts would be here and if they wanted any particular account they could select them, or if not, you don't have to use them.

Mr. Lynch: There is no account in the files of this court showing funds on hand sufficient to pay this tax liability.

Mr. Harpole: I perhaps will concede there are no funds on hand but the petition prays it also be paid out of the property, if I remember it right. I think it is up to the Trustee to show how far he can go on paying the taxes. We have established the liability and our claim has been allowed.

Mr. Lynch: So have a lot of other claims. The records of this court show there are over \$50,000 of other administration expenses outstanding.

The Referee: I think it is incumbent to show the nature of the fund on hand. It is a simple matter to call the Trustee and show that.

Mr. Harpole: Well, I will call Mr. Metcalf. [17]

H. F. METCALF,

called as a witness in behalf of the United States of America, being first duly sworn, testified as follows:

Direct Examination

By Mr. Harpole:

Q. What is your name? A. H. F. Metcalf.

Q. Are you the Trustee in Bankruptcy of the F. P. Newport Corporation, Limited? A. Yes, sir.

Q. Do you have any property in that estate?

A. Do I?

Q. Yes, as Trustee?

A. No, sir. Do I have property in the estate?

Q. Yes. A. Oh, yes, sir.

Q. What does that property now consist of?

A. I cannot give it all to you, but a general resume' of it consists of nine acres of oil land and harbor frontage on Channel number 3 in Long Beach Harbor;

About twenty acres of property on Hill Street that I think is in process of sale now, I think is probably sold for \$25,000;

150 acres of land in the San Fernando Valley, bounded by Victory, Van Owen, Coldwater Canyon and Fulton Streets; [18]

About fifty or seventy-five unsold lots in Verdugo Woodlands;

The Verdugo Park in Verdugo Woodlands that is under process of sale to the City of Glendale at this time;

About seven or eight hundred—I am not exact as to the acreage, but about seven—no, about four hundred and fifty or five hundred acres of unsubdivided land located on both sides of the Verdugo Woodlands in the Hills.

(Testimony of H. F. Metcalf)

Now, in addition to that there is some property near Tulare Lake, a few lots in Compton and one hundred and some lots up on Honolulu—no—well, it is out in the Sunland Valley.

That is about all.

Q. Do you have any cash in the coffers of the estate?

A. Counting the payment that was made yesterday by the oil company which I think was \$6100, in all accounts I have about between twenty-eight and twenty-nine thousand dollars.

The Referee: Now, you say in all accounts. How many different accounts have you?

A. Three, I think, your Honor.

Q. Will you describe each of those accounts and how much you have in each of them?

A. I am sorry, sir, I cannot do that. I didn't know I would be questioned regarding that.

Q. Aproximately?

A. The approximation would be about \$22,000 in the oil [19] company account. That is the oil account that was, I believe, subordinated to the bank, and then there is twenty-eight hundred or three thousand dollars in another account, and there is a special oil account but I have forgotten how much is in that. I don't watch that very closely.

Q. You say that twenty-eight hundred or three thousand dollars is in your general Trustee account, is it not?

A. No, I think that is the sale of property account, your Honor. That embodies some money deposited for the sale of property. I am not sure of the amount. There was \$22,000 on my last statement from the book-

(Testimony of H. F. Metcalf)

keeper which was during the latter part of last week and since then I have gotten \$6100 so I know the total accounts are a little in excess of \$28,000 and the bulk of that, of course, about \$22,500, is in the oil account which is the large account of them all.

Q. This twenty-eight hundred or three thousand dollar account is where you accumulate some money from the sale of real property? A. That is right.

Q. What is the other account?

A. There is an oil lease, your Honor, on some small lots. I don't believe those accounts are under the lien of the bank, are they?

Mr. Shelton: We have some that are and some not. Mr. Lynch, I think, can tell you. [20]

Mr. Lynch: Yes. May I interrupt?

The Referee: Yes.

Mr. Lynch: If I can, I think I can straighten it out. Mr. Metcalf is a little confused about the accounts.

A. Yes, I am.

Mr. Lynch: Mr. Metcalf, the oil account, that is the Universal Consolidated Oil Company royalties are deposited in a special account? A. That is right.

Q. At the Security-First National Bank, head office?

A. Yes.

Q. That is the account to which you refer to as being about \$22,500?

A. That is correct. It was \$16,000 last week and there has since been received and ready to deposit or in the hands of the bookkeeper \$6135, I think, for the past current month oil income.

Q. In addition to that account you have another special account at the Citizens National Trust and Sav-

(Testimony of H. F. Metcalf)

ings Bank in which you have deposited, since the date of the receipt by you of the letter of the Security-First National Bank, all other income that you have received from the properties covered by the bank's contract?

A. Yes, that is correct.

Q. And that includes payments made from community oil and gas leases and some little payments on properties [21] covered by that contract?

A. That is correct.

Q. And in that account there is approximately \$2800?

A. That is correct, I think, yes.

Q. Then you have a general account at the Citizens National Bank in which are deposited revenues from properties other than covered by the contract?

A. Yes.

Q. And in which you have also deposited deposits on account of purchases? A. Yes.

Q. And in that account there is only approximately two or three hundred dollars, and that represents deposits made on account of purchases of property which might have to be refunded?

A. Small amounts, several hundred dollars. I have forgotten exactly.

Mr. Lynch: That is all.

The Referee: How do we get \$28,000 out of that twenty-two thousand and three thousand, that would be twenty-five thousand and then you say in the other account is two or three hundred dollars.

Mr. Lynch: The balance of that other account represents deposits,—your lot deposits amount to \$4025?

A. There was \$2800 and then more money has been deposited since I took cognizance of it. [22]

(Testimony of H. F. Metcalf)

Q. Today those lot deposits are \$4,025, isn't that correct? A. I assume it is, yes.

Q. And the balance in that general account is the sum of \$156.57? A. Yes.

Q. Now, in the special rent account instead of \$2800 it is \$1495.02?

The Referee: What account is that?

Mr. Lynch: That is the account at the Citizens National Bank in which there have been deposited since the date of the demand of the bank, I think August 4, 1943, all rentals received.

The Referee: And how much is the amount?

Mr. Lynch: \$1495.02.

A. I opened a new account, your Honor, when the bank filed their action and it got a little confusing having so many accounts at the Security-First National Bank so I opened an account at the Citizens National Bank.

Mr. Shelton: Now, may I ask, because I want this in the record correctly, the amount you spoke of in your special account now at the Citizens National Bank for surface rentals collected by the Trustee subsequent to the notice of the bank.

Mr. Lynch: Subsequent to August 4, 1943?

Mr. Shelton: Yes, and that is for surface rentals from [23] property subject to the lien of the bank.

Mr. Lynch: That is right, and from receipts from the community oil and gas lease royalties.

Mr. Shelton: Received since that date?

Mr. Lynch: That is right.

Mr. Shelton: But on property subject to the lien of the bank.

(Testimony of H. F. Metcalf)

Mr. Lynch: Subject to the contract of the bank. That amounts to \$1495.02.

Mr. Shelton: That memorandum you are reading from was furnished you by whom?

Mr. Lynch: By Mr. Newport, and prepared by Mr. Gribble.

Mr. Shelton: And you are satisfied that is correct, Mr. Lynch?

Mr. Lynch: I am.

The Referee: What is the amount in your oil account?

Mr. Lynch: That is \$22,980.19—just a moment. That may be in error. Yes, \$22,980.19.

The Referee: Then in the sale of property account there is \$4,025?

Mr. Lynch: Yes, that is right; however, that is in the general account. That general account is \$4,181.57. \$4,025, however, of the amount on deposit in that general account represents the deposits made by proposed purchasers of property and unless those sales are confirmed those deposits would be returnable. [24]

A. Well, if those sales are completed there will be—one of the sales is \$4750 and the other \$25,000. There will be nearly \$30,000 in money. Exactly how much is paid preliminarily I cannot tell you at this moment but I think about the amount there. Each one puts up a certain amount of money with their proposals.

The Referee: Were you through with that, Mr. Lynch?

Mr. Lynch: The total of the general account is \$4181.57.

(Testimony of H. F. Metcalf)

Mr. Shelton: I wanted to ask a question or two, your Honor, please.

The Referee: I want to ask him one question:

Q. You have got considerable money here in the oil account and the sales of property account. How long has it been since you have made any disbursements from that fund to the Security Bank?

A. Oh, some couple of months, I guess.

Mr. Lynch: It has actually been longer than that. We have made no disbursements of that fund—

A. Oh, that is since the 4th of August.

Mr. Lynch: Since the demand of the bank?

A. Yes.

The Referee: What I am getting at, up until the time the bank served notice on you they were going to foreclose you have disbursed this money received on property they have had security on to the Security-First National Bank? [25]

A. Mostly, your Honor. Ever since I have been in the picture we have disbursed I think every month regularly as fast as the check came in and your Honor got an order out it was paid promptly. After the order I was instructed to hold the money until further orders.

Q. And that is the reason for the accumulation of this money in the bank account?

A. That is correct. The bank has not asked me for the money. I have discussed it with the bank but no demand has been made.

Q. You don't know the exact total amount you have paid the bank? A. Since I have been in office?

Q. Yes. A. About \$800,000.

Q. But you do not know the exact amount?

A. No.

(Testimony of H. F. Metcalf)

The Referee: I think we ought to have Mr. Gribble here with the exact figures.

Mr. Lynch: We have an exhibit we propose to offer during the course of the testimony which will show the amount paid.

The Referee: Very well.

Mr. Harpole: Mr. Metcalf, do you have any opinion as to the value of the unsold real property in this estate?

Mr. Shelton: Just a moment— [26]

A. I certainly have.

Mr. Shelton: Well, you have an opinion.

A. Yes, sir.

Mr. Harpole: Q. Have you been engaged in the real estate business, Mr. Metcalf, at any time?

A. I have been engaged in the real estate business in Los Angeles County for thirty-eight years, your Honor, or Mr. Counsel.

Q. Have you bought and sold real property?

A. Plenty of it.

Q. And real property that compares or is located near to the real property held in this estate?

Mr. Shelton: Mr. Harpole, why cannot we reach that by a statement of this kind or a stipulation of this kind, that there is sufficient money to pay the demand that you have made and for which your petition has been filed, and in value of property if the Government claim is prior to that of the bank. I don't think there is any doubt about that. We do not think it is competent, however.

Mr. Lynch: As a matter of fact, the testimony now discloses that the Trustee does have funds if in fact the Government is entitled to look to those funds, for the payment of its claim. The Trustee has funds on hand.

(Testimony of H. F. Metcalf)

Mr. Harpole: It might be material in case the Court should hold that the bank comes first but that the property has enough value to pay both of us. [27]

Mr. Lynch: That is something else again. Now, the Trustee has not objected to that sort of a stipulation, but if it is the Government's contention they are entitled to direct this Trustee to pay this obligation now because there might be enough in this property at some time to realize enough to pay it, that doesn't make sense. We are not stipulating on what the Trustee might have in his hands at some future time but we are now determining this present petition of the United States Government that this Trustee pay this cash right now. Now, they have got to show an ability to pay the tax or funds out of which it can be paid. Now, it is conceivable, of course, that when and as the bank has been paid off that there will be funds—we don't know that but we certainly have thought so for the last five or six years or we would not be here.

The Referee: I think the Court can take judicial knowledge of the fact there are other administration expenses that have not been paid.

Mr. Lynch: That is correct, and I intend in the course of the testimony to offer proof to that effect.

Mr. Harpole: May I have an answer to my question?

A. What was the question, please?

Mr. Harpole: Will you read the question, Mr. Olson?

Mr. Shelton: May I ask this, to shorten time. The purpose of this question is to qualify him to answer questions as to the value of the property? [28]

Mr. Harpole: That is right.

Mr. Shelton: And to that testimony we object as incompetent, immaterial and irrelevant.

(Testimony of H. F. Metcalf)

The Referee: Objection overruled. Read the question.

(The reporter read the pending question as follows: "Q. Have you bought and sold real property? A. Plenty of it. Q. And real property that compares or is located near to the real property held in this estate?").

A. Yes, sir.

Mr. Harpole: Q. You have testified as an expert witness in many court actions in the Federal and Superior courts in Los Angeles County concerning that?

A. Yes, I have, counsel.

Q. What in your opinion is the present value of the real estate that is in your possession as Trustee in Bankruptcy of the F. P. Newport Corporation, Limited?

Mr. Shelton: To that question we again renew our objection that it is incompetent, immaterial and irrelevant at this time, and add to that the objection that an insufficient foundation has been laid.

The Referee: In what respect has the foundation not been laid?

Mr. Shelton: As to the qualifications of the witness.

The Referee: In what respect?

Mr. Shelton: That there is not a broad enough foundation laid to indicate that he is able to answer the question. [29]

The Referee: Are you familiar with the specific properties in your possession?

A. I am familiar with every property in this estate in my possession except a piece of acreage in or near Tulare Lake. That I never have seen. I have had correspondence about it.

Q. Eliminating that piece, what in your opinion is the reasonable value?

(Testimony of H. F. Metcalf)

Mr. Shelton: May it be deemed as to this line of questions the same objection will run?

The Referee: Very well. Objection overruled. You may answer.

A. I think perhaps it would save time if I gave the value of each piece, wouldn't it, your Honor, or do you want the gross amount?

The Referee: You can give me the gross amount. They may want to cross examine you specifically as to each piece.

A. Just a moment, please. I could have brought up figures on that but I will give them to you in just a moment. Between a million and a million and a quarter dollars. Probably nearer a million.

Mr. Shelton: Now, may it please the Court I move that that answer of the witness be stricken out on the ground that he is testifying as to values of property in a bankrupt estate. Some properties are subject to the liens of the bank and some are not. There is no evidence here that he is [30] an oil expert, that he knows the reserves on the nine-acre piece.

The Referee: That is a matter that can be developed by cross examination, I think. Motion to strike denied.

Mr. Harpole: Q. Now, Mr. Metcalf, do you recall how much has been paid to the Security-First National Bank since the 15th of March, in the year 1938, on its obligation?

Mr. Lynch: May I have that question?

(The reporter read the pending question.)

Mr. Shelton: As to that I object as incompetent, immaterial and irrelevant as to the Government claim. What difference does it make to it whether it has been paid or not.

(Testimony of H. F. Metcalf)

The Referee: It may be material. Objection overruled.

Mr. Shelton: If it were in the other proceeding I think it would be competent evidence.

The Referee: Is that the date your tax claim started?

Mr. Harpole: That is the date the income tax return was due. I don't mind telling you why I think it might be material. Maybe the bank has received money it should not, and the Government should have that fund.

The Referee: Objection overruled.

A. As to that date I cannot, exactly.

The Referee: Mr. Gribble can give that?

A. Mr. Gribble can give figures and dates exactly, your Honor. There has been about \$800,000 paid on [31] principal, all taxes and interest. Now, I think the bank has had to date a million dollars, roughly, but I cannot tell you that exactly. Mr. Gribble can give you that exactly.

Mr. Lynch: The sixth report and account of the Trustee is on file in this court and it does have those figures contained in them.

A. I read them particularly and am familiar with them.

The Referee: What are the figures in that account?

Mr. Lynch: I have my copy here. (Handing to the witness.)

The Referee: Go ahead and state what they are.

A. Disbursements. Payments on property in trust, principal paid in cash \$720,760.76; interest paid \$238,-079.03. Taxes and street improvement bonds are not pertinent here, your Honor, are they?

The Referee: Do you wish any further figures, Mr. Harpole?

Mr. Harpole: I believe that will be sufficient.

(Testimony of H. F. Metcalf)

The Referee: Now, those amounts were paid since when? A. March 25, 1935 to August 31, 1943.

The Referee: The question was, what amount had been paid since March 15, 1938.

Mr. Harpole: Do you have the breakdown?

A. I haven't the breakdown, no sir. Mr. Gribble can give you that though very easily. [32]

Mr. Shelton: The point of your question is how much has been paid since the tax became due?

Mr. Harpole: Yes.

The Referee: I think you better get Mr. Gribble with those figures.

Mr. Lynch: We will have him here this afternoon. March what date?

Mr. Harpole: March 15, 1938—no, March 15, 1939 would be the correct date.

Mr. Lynch: March 15, 1939?

Mr. Harpole: Yes.

The Referee: Any further questions, Mr. Harpole?

Mr. Harpole: No further questions of this witness.

Cross-Examination.

By Mr. Lynch:

Q. Mr. Metcalf, you have testified as to what properties were in the estate. Now, the properties that you have mentioned as being still in the estate are all properties which are subject to the contract made with the Security-First National Bank and dated January 12, 1937 which has been introduced by the Government as its Exhibit A, is that correct?

A. You refer now to the value I gave?

(Testimony of H. F. Metcalf)

Mr. Lynch: No, about the properties you have referred to as being properties of this estate still left in the estate? [33]

A. The property outside of the bank's lien in the Newport estate are very small. They are almost negligible, scattered lots here and there worth singly hundreds of dollars, and some scattered lots up in the Sunland district so enmeshed in taxes and street liens they would have very little value. The bulk of the value, I would say ninety-nine per cent of the value of the estate is under the bank's lien.

Q. And the properties specifically referred to in your testimony—

A. They are all under the bank's lien.

Q. As a matter of fact, all of the properties outside of the properties that are covered by the bank's contract are heavily encumbered with taxes, aren't they?

A. I think they are, yes. I know there is one piece in the Verdugo Valley under the first lien to the Bank of America, and it is in arrears heavily and it is in a very unfortunate condition. The estate has not tried to protect that.

Q. And the property in Tulare you referred to a moment ago, that property is on the five-year tax payment at this time?

A. I understand so, yes.

Q. The properties outside of the bank's properties, or outside of the properties that are referred to in the bank's contract of January 12, 1937, are of merely nominal value? [34]

A. Very nominal. Very nominal.

Q. Now, Mr. Metcalf, all of the funds that have been paid to the bank concerning which you have just testified,

(Testimony of H. F. Metcalf)

to-wit, \$720,760.76 paid on principal and \$238,079.03 paid on interest, those funds were paid to the bank pursuant to specific orders of this Court, isn't that true?

A. All of them, yes, sir.

Mr. Lynch: At this time we offer by reference each and all of the orders made by this Court directing the disbursement of funds to the Security-First National Bank together with the petition upon which those orders are based.

The Referee: They may be received by reference as Trustee's Exhibit A in this proceeding.

Mr. Lynch: Now then, we also offer at this time the Trustee's Accounts 1, 2, 3, supplement to number 3, 4, 5 and 6 by reference.

The Referee: They may be received as Trustee's Exhibit B.

Mr. Lynch: Now, Mr. Metcalf, the funds which have been paid to the bank to which you have just testified are funds derived from the Universal Consolidated Oil Company as royalties under its oil and gas lease, and sales of property, title to which stands of record in the name of the—stood of record in the name of Security-First National Bank? A. That is correct.

Q. As security for its obligation, and are referred to [35] or covered by the contract of January 12, 1937?

A. I think that is correct, yes sir.

Q. So that all of the funds that have been so disbursed to the bank have come from sales of the property covered by its contract or oil and gas revenue from the Universal Consolidated oil and gas lease, including the original payment made by the Universal Consolidated Oil Company as a bonus? A. That is right.

(Testimony of H. F. Metcalf)

Mr. Lynch: At this time we offer by reference the Universal Consolidated oil and gas lease which is attached to the Trustee's petition for approval of that lease, that is, the petition for authorization and approval on confirmation of oil and gas lease and for order to show cause to execute, the petition being executed by Mr. Metcalf as Trustee and also by the Security-First National Bank and the F. P. Newport Corporation, Limited, bankrupt.

The Referee: The lease may be received as Trustee's Exhibit C by reference.

Mr. Lynch: Mr. Metcalf, the funds to which you have testified that you have on hand have been held by you and no disbursements have been made from them—withdraw that.

Q. The moneys that you have received from the Universal Consolidated oil and gas lease royalties have been held by you in the special account at the Security-First National Bank since August 4 and no disbursements have been made therefrom except a disbursement of ninety some odd dollars [36] to pay for the inspection of the property?

A. Yes, sir. There is an inspection charge of \$90 a month.

Q. You have also opened up an account at the Citizens National Bank, the Citizens National Trust and Savings Bank, head office at Fifth and Spring, in which you deposited other income from the property covered by the agreement of January 12, 1937, since August 4th?

A. That is correct.

Q. And no disbursements have been made from that fund? A. None at all from that that I know of.

(Testimony of H. F. Metcalf)

Q. And the United States Government and the Security-First National Bank are both making claim to the right to receive payment out of those funds?

A. I have so heard. I have not been served with any notice. I understand it to be true.

Mr. Shelton: Yes, you have been served.

Mr. Lynch: Your counsel has.

Mr. Harpole: The Government demands payment from any and all sources. The tax does not apply to a certain fund. If demand has not been made it may be understood it is made, and Congress has pretty-well settled that.

Mr. Lynch: In addition to that there was a stipulation made at Mr. Harpole's insistence that no disbursements be made from that fund pending the determination of the question.

A. Your Honor could I say something? [37]

Mr. Shelton: Let me get this clear on the record first: It is your position then you are asking not only from income from properties, rents, issues and profits, but you are also demanding as a prior right to pay this Government tax the proceeds from the sale of the real property subject to the lien of the bank?

Mr. Harpole: That is true.

Mr. Shelton: That is what I understood.

A. I was asked a question here, and may I explain?

The Referee: Yes.

A. I think I was asked if the value of the estate would pay the two claims, was I not asked that?

Mr. Lynch: Not that I know of.

A. I meant to say that would be to the extent—the value is there, to pay them, unquestionably.

(Testimony of H. F. Metcalf)

Mr. Shelton: I move that be stricken out as a conclusion of the witness, and a voluntary statement.

The Referee: It is a voluntary statement. It may go out.

A. May I make a further statement?

Mr. Shelton: I would rather have counsel ask the questions so as to give us an opportunity to object, if we so desire.

A. I wanted to clear up a statement I made.

The Referee: You may do that.

A. I was asked something about the value of the estate, [38] and the value of the estate would depend to some extent on what action the Government may take on the sale of further property. They may make claims that may wreck us, and the nature of the claims asserted in some places are pretty serious, and the Federal Government insists on certain claims here and I don't know whether the estate would liquidate those or not. There is abundant value in the estate to pay the Security-First National Bank and the Government if it is liquidated in an orderly way.

Mr. Shelton: I object to that again as a conclusion of the witness, a voluntary statement and self-serving, and ask it be stricken.

The Referee: That part of the statement may be stricken.

Mr. Harpole: I think the statement is proper. I fail to see where it is self-serving.

The Referee: It is more or less voluntary. It may be stricken.

Mr. Harpole: We are only interested in the adjudicated tax claim in this proceeding. I am not trying the

(Testimony of H. F. Metcalf)

case on the theory the Government may have other claims.
I don't know whether the Government has or has not.

The Referee: Very well.

Mr. Shelton: But you have a pretty good idea, haven't you?

Mr. Harpole: No, I haven't even a good idea. [39]

Mr. Lynch: Q. Mr. Metcalf, there are unpaid a large amount of expenses of administration?

A. Yes, there are quite a few.

Mr. Lynch: At this time we offer by reference the orders fixing and allowing the fees and other administration expenses and orders directing payment thereof.

Mr. Shelton: What is the purpose of that?

Mr. Lynch: I want to show there is in excess of \$50,000 unpaid expenses of administration, in addition to the Government claim.

Mr. Shelton: I see, for the purpose of throwing light on your claim in the answer that the other expenses of administration are entitled to equal treatment with the Government?

Mr. Lynch: I think that would become a law point, that if the Government is entitled to be paid out of these funds that it has no priority over other expenses of administration.

Mr. Harpole: I am not willing to go along with that idea. The Government's petition did not contemplate it would try the claims of any one else that might consider themselves an expense of administration, and it is possible that the parties to the contract, particularly the Trustee and his attorneys may have waived some rights they otherwise would have had. Certainly, the United States did not do anything of that kind in so far as it came to the [40] knowledge of its counsel. I don't want to be

(Testimony of H. F. Metcalf)

placed in the position of subscribing to any of the contentions that all administration expenses are necessarily on a par in this case.

The Referee: Very well. The orders with reference to the allowance of administration expenses on file in the case may be received as Trustee's Exhibit D by reference.

Mr. Lynch: And also the orders directing payment.

The Referee: Yes.

Mr. Lynch: Now, Mr. Metcalf, no disbursements have been made to administration expenses except on the express order of this Court? A. That is correct.

Mr. Shelton: Well, we are slowly getting the entire record in.

Mr. Lynch: That is what I suggested a while ago we do.

The Referee: Any further questions of this witness?

Mr. Harpole: Q. Mr. Metcalf, do you know whether you paid the 1938-1939 income tax?

A. I don't recall, Mr. Harpole, I ever paid any income tax. I don't think so, no.

Mr. Lynch: We will stipulate there has been no income tax paid.

The Referee: Very well. Any further questions?

Mr. Lynch: I have no further questions.

The Referee: Do you have any further questions, Mr. Shelton? [41]

Mr. Shelton: Not from this witness.

The Referee: You may stand aside.

Mr. Lynch: Pardon me, but I have one more question:

Q. Mr. Metcalf, you have no funds out of which you might pay this claim of the Government other than funds

(Testimony of H. F. Metcalf)

that are derived from oil and gas royalties and the sale of properties that have taken place?

A. And surface rentals.

Q. Titles to which are held by the Security-First National Bank?

A. No, I have no other accounts, no sir.

The Referee: Any further questions?

Mr. Shelton: I think the declaration of trust has been already received in evidence by reference?

The Referee: No, the agreement was.

Mr. Shelton: At this time then we ask the declaration of trust be offered in evidence by reference.

Mr. Casey: It is in the files.

Mr. Shelton: It should be in the files. It is in all the transcripts but I don't know whether it is in the regular files or not.

Mr. Lynch: If you have a copy I think you better introduce it.

Mr. Casey: Wasn't it attached to your claim?

Mr. Shelton: I think so.

The Referee: I think it may be offered by reference [42] I am sure it is in the file. There is no use in encumbering the record.

Mr. Shelton: I think the suggestion made by Mr. Lynch is good, that the transcript of the record which has in order the trust—you have the trust in that, haven't you?

Mr. Lynch: I don't think so.

Mr. Shelton: In the transcript in the Neblett case we have them in order, the original Neblett case.

Mr. Casey: The original Neblett case went up with my case and I don't think it was in that.

(Testimony of H. F. Metcalf)

Mr. Shelton: No, it is the one that went up in an attempt to overrule the order of this Court, entitled the case of F. P. Newport Corporation versus McAdoo, and so forth, number 8703.

The Referee: The declaration of trust may be received in evidence as Bank's Exhibit number 1.

Mr. Shelton: If that is not found to be in the files, what is the situation?

The Referee: If the Court does not find it in the files I will make it known to you gentlemen.

Mr. Lynch: We have a copy here we can leave with the Court.

The Referee: I am certain the Court has it because I have passed on it before.

Mr. Shelton: I know it is in the file and in the transcripts on appeal. [43]

Mr. Lynch: I think I did ask this question but I want to be sure as I think on this particular petition this is a rather crucial question:

Q. Mr. Metcalf, I think you have testified as to what funds you have on hand? A. Yes, sir.

Q. And those are all of the funds you have on hand?

A. Those are all of the funds that I have on hand.

Mr. Lynch: That is all.

The Referee: You may stand aside.

Mr. Lynch: We will have Mr. Gribble here this afternoon on that other matter.

The Referee: Do you have any further questions?

Mr. Shelton: We may want to use him as the basis for putting further testimony in.

The Referee: You do not wish to ask any further questions now?

Mr. Shelton: No, not now.

(Testimony of H. F. Metcalf)

The Referee: Call your next witness, Mr. Harpole.

Mr. Harpole: That is all.

The Referee: You rest your case?

Mr. Harpole: That is right.

The Referee: Does the Trustee have any further evidence?

Mr. Lynch: No.

The Referee: Does the bank have any evidence?

Mr. Shelton: Yes, we have evidence to go in. [44]

The Referee: You may proceed.

Mr. Shelton: We offer in evidence by reference to the files of the bankrupt proceeding the various and sundry deeds which have heretofore been introduced in evidence and are in the files which was given to the bank at the time of the declaration of trust was entered into.

The Referee: They may be received as Bank's Exhibit number 2.

Mr. Lynch: Wait a minute. I didn't quite understand that.

Mr. Shelton: The declaration of trust refers to properties and the descriptions, and I think they were originally introduced in evidence as deeds.

Mr. Lynch: I don't think so.

The Referee: If the Court does not find them he cannot consider them.

Mr. Shelton: I don't think it is necessary to introduce the deeds because a description of the property is set up in the trust, and we will withdraw that.

The Referee: Very well.

Mr. Shelton: I know the notes which created the original indebtedness went in.

The Referee: There is no question about the consideration of the trust.

(Testimony of H. F. Metcalf)

Mr. Shelton: We don't know. Well, of course, that is not on Mr. Harpole's proceeding. Mr. Harpole conceded the [45] indebtedness due to the bank as evidenced by the agreement entered into between the respective parties.

Mr. Harpole: I do not make any contest about the amount of the debt due to the bank. I understand it is about seven hundred thousand dollars.

Mr. Shelton: As evidenced—

Mr. Harpole: By the files.

Mr. Shelton: And the petition.

Mr. Harpole: Yes, the files in this proceeding. I understand the debt is nearer six hundred thousand dollars than seven hundred.

Mr. Shelton: It is stated in the answer.

Mr. Lynch: Can we stipulate it is \$617,278.12 principal?

Mr. Harpole: I will stipulate to that.

Mr. Shelton: Just a minute.

Mr. Lynch: That does not include \$17,897.73 which the bank claims to be a part of its secured indebtedness, that latter amount being disputed by the Trustee. Of course, admittedly as far as the Trustee is concerned this was advanced by the bank but we simply assert it is not a proper item to be included as secured by the trust.

Mr. Shelton: Yes. Those two items constitute our claim, but of course there is delinquent interest.

Mr. Lynch: Yes, I said principal. Interest is unpaid since June 7, 1942, and the interest rate is four per cent per annum, compounded quarterly. [46]

Mr. Shelton: We will so stipulate.

Mr. Harpole: I will accept the stipulation on the Trustee's statement.

(Testimony of H. F. Metcalf)

Mr. Shelton: Now, we would like to introduce at this time the Referee's certificate on the writ of review from the order approving and allowing the contract of January 12, 1937.

Mr. Harpole: That is objected to as immaterial.

The Referee: How would the writ of review be material?

Mr. Shelton: The certificate of the Referee, a certification as to the understanding of the parties at the time that went up and his findings of fact or order that was affirmed.

Mr. Harpole: That is something that was made in the absence of the United States.

The Referee: I don't know how a certificate on review could be evidence. There might be documents attached to the certificate on review but any statement the Referee would make would not be proper evidence, I don't believe.

Mr. Shelton: We are going to get down finally as to what the intention of the parties was with regard to the construction of the contract. We are going to contend, frankly, this whole matter as to what our rights are has been adjudicated.

The Referee: You could not prove what the understanding of the parties was by something I said on a writ of [47] review. Wouldn't that be hearsay?

Mr. Shelton: No, you are the Judge. Your expression on the approval of the contract would be eloquent language when you have been affirmed by two courts. Now, there is a peculiar construction attempted to be placed on this contract and we want the evidence of all parties, including the Trustee's attorneys and the bank's officers and its directors as well as the Referee's at the time this went through.

(Testimony of H. F. Metcalf)

Mr. Lynch: As far as the Trustee is concerned we likewise join in that objection. I don't think the Referee's certificate is a matter of evidence.

The Referee: I cannot see how a Referee's certificate could be evidence. There might be some document attached to it that may be.

Mr. Shelton: Suppose we put it this way. We will withdraw that offer, and offer in evidence at this time the findings and the order of this Referee approving the contract of January 12, 1937 as modified by the supplemental agreement.

Mr. Harpole: That is objected to as immaterial, your Honor. Here is a contract and a supplemental agreement both in evidence in this proceeding, being introduced this morning, and we submit the effect of that is the question now in controversy between the United States and the bank.

Mr. Shelton: The intention of the parties to a con-[48]tract at the time it was made is always proper evidence if there is a conflict arises over the proper construction of the contract. Now, we are going to have to meet that. As a matter of fact, that is one of the main points in this whole argument, what was intended.

Mr. Harpole.: The question before us on this petition, if there is any question of intent, is what was intended to be done with the income taxes, and certainly there has been nothing done about that. If there was any intention expressed it has been probably overruled by the action of the Ninth Circuit Court decision on the Government claim. It was the intention of the Trustee to disallow that claim at one time and he effectuated that by filing an objection and going as far through the courts as he could go.

(Testimony of H. F. Metcalf)

Mr. Shelton: I don't think counsel gets the point that is being made. He very frankly states his position is that this is an expense of administration. In that respect he is joined in by the attorney for the Trustee, and the question arises as to whether expenses of administration, your Honor, can after this contract made by the respective parties, take priority over the lien and security given the bank by contract approved by this Court. Now, if there is a question arises in the mind of this Court as to what the intention of that contract would be, or the modification, what was said and done at the time is of the highest importance. Now, you will notice Mr. Harpole introduced the [49] judgment of the Court. We propose to do that, too, by reference to the decision affirming this Court's finding and order.

The Referee: I will overrule the objection and admit by reference the order and findings in connection with the hearing just mentioned. That was my order on whether or not the bank had a secured claim?

Mr. Shelton: That is right.

Mr. Lynch: It was the finding and order approving the contract.

Mr. Shelton: Yes, and it ruled on it incidentally as to the validity of the bank's security.

The Referee: Very well. That may be received as Bank's Exhibit 2.

Mr. Shelton: Then we offer in evidence at this time the order of Judge McCormick approving the order of the Referee confirming and approving this contract.

The Referee: That may be received as part of Bank's Exhibit 2.

(Testimony of H. F. Metcalf)

Mr. Shelton: Then by further reference we offer into evidence the opinion of the United States Circuit Court of Appeals in Case number 8703 entitled the Matter of F. P. Newport Corporation, Limited, Bankrupt. A co-partnership consisting of William G. McAdoo and William H. Neblett, and William H. Neblett, Appellant, versus F. P. Newport Corporation, Limited, *et al.* That case is now found in [50] 98 Federal Second, 453.

The Referee: It may be received as Bank's Exhibit 3 by reference.

Mr. Shelton: Mr. Lynch, have you the original of the notice directed to H. F. Metcalf calling due the amount of money and giving the sixty-day notice?

Mr. Lynch: I don't believe I have it with me, but I will stipulate—

Mr. Shelton: I have a copy of it here I can introduce.

Mr. Harpole: I have no objection to the copy but the materiality of it is objected to on the proceeding on the tax claim.

Mr. Shelton: We offer this in evidence on the theory, your Honor, that this is a demand for the sequestration of funds belonging to the bank in the hands of the Trustee and initiating the proceedings for foreclosure at the time it was given, dated July 30, 1943.

The Referee: Objection overruled. It may be received as Bank's Exhibit 4. I understand there is no objection to the document because it is a copy?

Mr. Harpole: That is true.

Mr. Lynch: Will you stipulate likewise that was received by the Trustee on August 4th?

Mr. Shelton: On or about August 4th. If you say it was August 4th I will so stipulate.

Mr. Harpole: I will so stipulate. [51]

Mr. Shelton: And do you stipulate on or about the same date you got a copy, Mr. Cahill?

Mr. Cahill: Yes, sir, I will.

Mr. Shelton: Now I am going to call Mr. Adams, please.

R. T. ADAMS,

called as a witness in behalf of the Security-First National Bank, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Shelton:

Q. Mr. Adams, your attention is directed to that modification of the agreement of January 12, 1937 which has been introduced in evidence and which took place before the Honorable Paul J. McCormick and was approved by him. Do you recall the occasion at the time the Borah Act came up? A. I do.

Q. Were you present in court at the time of the argument regarding whether or not the stipulation or the contract violated the Borah Act?

A. I was present in court and I recall it.

Q. That was the last stipulation that was made modifying the contract of January 12, 1937 prior to its final approval by Judge McCormick?

A. That is correct, I believe. [52]

Q. You were representing the bank and had been there during all these negotiations?

A. That is correct.

(Testimony of R. T. Adams)

Q. And I am going to ask you if you signed that as assistant secretary of the bank, did you not?

A. I believe so.

Q. And recommended it to Mr. L. W. Craig, the vice-president, to sign it? A. Yes.

Q. And on your recommendation he did sign it?

A. It was signed, yes.

Q. Do you know who drew that modification of the contract?

A. That was drawn in the office of the counsel for the Trustee.

Q. Messrs. Bailie, Turner and Lake?

A. Yes, sir.

Q. And directing your attention to the agreement as the supplemental agreement of August, 1937, part of the contract of January 12, 1937, I direct your attention to a modification or some language left out by Messrs. Bailie, Turner and Lake at that time. The contract before modification read as follows:

"While the said Declaration of Trust No. 7224, and the contract of January 12, 1937, provide expressly that all moneys from sales and leases of property in [53] said trust, shall be paid to and be received by the bank, it is, nevertheless, agreed, pursuant to the order of said bankruptcy court, that such payments shall pass through the hands of the Trustee in Bankruptcy, and be paid to said Trustee in Bankruptcy, and shall be by him forthwith paid over in full to the bank to be distributed in accordance with the terms of the said Trust number D 7224, and the agreement of January 12, 1937, as modified hereby."

Mr. Harpole: That question is objected to as immaterial on the tax claim.

(Testimony of R. T. Adams)

The Referee: Is your question completed yet?

Mr. Shelton: I am just calling his attention to this claim.

Mr. Lynch: You have not asked any question yet.

Mr. Shelton: No, I have not.

"It is expressly understood and agreed that any such funds so passing through the hands of the Trustee in Bankruptcy, except as hereinafter provided, shall, while in his possession, be impressed by the lien of the Declaration of Trust securing the indebtedness owing to the bank. Such funds shall be deposited by the Trustee in Bankruptcy in a separate fund, and not commingled with any other funds in the bankrupt estate, and shall be deemed earmarked for application on the bank's indebtedness, and, except as in said agreement [54] of January 12, 1937, provided, shall not become any part of the general assets of the bankrupt estate, nor charged with the payment of any of the expenses of administering said bankrupt estate, and nothing herein contained shall prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee."

Q. Now, when that modification was made, that last clause, "nor charged with the payment of any of the expenses of administering said bankrupt estate, and nothing herein contained shall prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee," the elimination of that phrase by Bailie, Turner and Lake was to meet what objection?

Mr. Lynch: Just a minute. I object to that on the ground it is highly improper and calls for the conclusion of the witness. The agreement itself is the best evidence of its contents, and there is no occasion for attempting to modify—

(Testimony of R. T. Adams)

Mr. Harpole: And it is immaterial.

Mr. Shelton: I will withdraw that question and I will ask you this question:

Q. By the omission of that phrase in the amendment thereto was there any intention at that time on the part of the bank to subject the property or the income from the property subject to this trust to administration expenses? [55]

Mr. Harpole: That is objected to as immaterial and having no bearing upon the rights or the questions presented by the claim for taxes.

Mr. Lynch: Objected to as immaterial, and on the further ground it calls for the conclusion of the witness, and not the best evidence.

The Referee: Objection sustained.

Mr. Shelton: Just a moment before you rule on that, your Honor please. We have some law on that point. There is a contention made here and it has been made before in a vague sort of way that a certain construction of this contract would indicate that the bank had an intention to subject its security to the payment of expenses in this estate by that modification. That contention is now made by the Government. They put in the contract and they claim that very thing.

Mr. Harpole: Just a minute.

Mr. Shelton: The claim is made by the Government the payment of expenses of administration, to-wit, the payment of income taxes, is ahead of the bank.

Mr. Harpole: We do not make it on the basis of the contract.

Mr. Shelton: We have a right to show that modification that has been laid hold of before was not made by the bank with intention to modify the plain language

(Testimony of R. T. Adams)

subjecting the whole thing to the payment of the bank
lien. [56]

As to whether or not we have a right to offer that, the California Supreme Court has ruled that where intention is the gist of the matter set forth in a contract the testimony of the parties to that contract may be elicited and put in evidence. That has apparently been repeatedly determined. The language used is this:

"Testimony to one's own intention, or other state of mind, has often been attacked on the ground that it is really a disqualification by interest. The argument is that, since a person's own intention can be shown only through himself, his statement of what it is or was cannot be safeguarded by the possibility of exposing its falsity, through the aid either of conflicting circumstances or of opposing eye-witnesses; and that thus the influence of self interest in falsifying is too dangerous and that such testimony should consequently be forbidden. This argument has been generally repudiated."

4 Wigmore on Evidence, 185.

"The views of the learned author are the same which have been repeatedly adopted by the courts of this state," and then follows a long list of authorities.

The Referee: Mr. Shelton, I think at this time we will take the noon recess and we will continue on with this matter at 2:00 o'clock. [57]

Mr. Cahill: Can I make an inquiry at this time? We are waiting on the other matter and may I ask how long you think this will take?

Mr. Shelton: I think we will finish in half an hour on this proceeding.

Mr. Cahill: Very well.

The Referee: 2:00 o'clock, gentlemen.

(Testimony of R. T. Adams)

(Whereupon an adjournment was taken to 2:00 o'clock p. m.) [58]

2:00 O'Clock, P. M. Session.

The Referee: You may proceed.

(Whereupon the reporter read the last question as follows: "Q. By the omission of that phrase in the amendment thereto was there any intention at that time on the part of the bank to subject the property or the income from the property subject to this trust to administration expenses?").

Mr. Shelton: Now then, the Court indicated he sustained the objection to that question. The principle of that rule has been well announced in one of the recent decisions, 56 Advance California Appellate at 731 in this language.

The Referee: Let me ask you this: If you had asked Mr. Adams what conversation if any transpired or led up to that amendment I think he could relate that but to ask him what was the intent on the part of the bank, doesn't that call for his conclusion?

Mr. Shelton: That is the one exception to the conclusion rule. You have a right on a contested matter—

The Referee: He was not the only member of the bank that executed this agreement, was he?

Mr. Shelton: No, but he was one of the signing officers and had charge of this thing. He could speak for the bank as to what its intention was because Mr. Adams was the [59] one who had charge of this matter, and he so testified.

(Testimony of R. T. Adams)

Mr. Harpole: If I might interrupt. I do not think we have any quarrel with the California authorities Mr. Shelton cites, but regardless of what this witness may have thought the intent was the courts of the United States have decided this income was subject to tax, and that is final.

Mr. Shelton: Oh no, the United States courts have never decided that this income was subject to the payment of this tax. They have decided I believe finally that certain income of the Trustee that was received by him would subject him to a tax but it has not decided as against the bank it is entitled to take that.

Mr. Lynch: No, but there has been a construction of this provision in the agreement by the Circuit Court of Appeals, as far as that goes.

Mr. Shelton: No, not even there. Whatever has been said in that connection has been *dicta* in that case.

Mr. Lynch: Well, they did construe it, whatever you call it.

Mr. Shelton: I am arguing on the point we have a right, where there is a questioned phrase or phraseology in a contract, and that is the only possible theory on which they could claim that because the contract even without the modifications is as plain as the nose on your face that the funds are sequestered for the secured creditors. The court so decided and it was affirmed. It was a contract of the [60] court through its officers. Now then, through some attempt to construe the modification of that contract it is to be urged and argued this income is subjected to the payment of administration expenses, and we have a right to show when that modification was made the facts and circumstances to enable the Court to construe what happened at that time.

(Testimony of R. T. Adams)

It is our position that the Court, and the record of the Court already put in evidence will show that this contract was approved by Judge McCormick. Then Mr. Neblett raised the Borah Act. There was phraseology in that agreement, put in possibly for the purpose of protecting the Trustee and the others who had an interest in the payment of fees, that, "Nothing herein contained shall prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee," and Mr. Neblett immediately jumped on that one phrase and said, ahha, that violates the Borah Act and I am the only man in town that has a copy of it. He reopened the matter for further hearing and suggested this be modified and amended. Mr. Bailie's office undertook to wipe out the clause that did that and in doing so added or left out one clause in the contract regarding the payment of fees. My testimony will be offered that I talked to Mr. Bailie at that time and he agreed with me that was only surplusage anyway and there was no intention to change the contract except to avoid the Borah Act. [61]

The Referee: My thought is—I may be wrong—that you could ask Mr. Adams what conversation took place preliminarily to this amendment, let him relate the conversation, but to ask him what the bank had in mind, it seems to me that that is calling for the conclusion of the witness.

Mr. Shelton: We are asking for the intention of the party to the contract that is in question. They claim that is subject to construction, that it is not plain. When we make that modification we are entitled to show the intent.

The Referee: Don't you show that by showing what transpired, and the Court must determine what the intention was.

(Testimony of R. T. Adams)

Mr. Shelton: You can do that. The mere fact he testifies that was his intention never to waive that does not necessarily prove his statement is true. You can test that by establishing certain facts and circumstances. The admissibility of the evidence is what we are now discussing, whether we have the right to ask him what the intent was at that time, and that I submit is decided and has been decided in this State for many years, and since the Federal Courts follow the law of the local jurisdiction I think we are bound by that law.

Mr. Lynch: I now anticipate what Mr. Shelton is attempting to do is to get this Court to put a different construction on that modification than the Circuit Court of Appeals did place on it in another proceeding where the bankrupt [62] was a party. I think under the circumstances that decision is a matter of *res adjudicata*.

Mr. Shelton: That is a matter for argument to the Court.

Mr. Lynch: And I object to it on that ground, in addition to the objections heretofore made.

Mr. Shelton: If the Court would bear with me for a moment I would like to cite further authorities. It is true where there is some ambiguity the facts and circumstances surrounding the making of a contract are always admissible. One rule goes further than that, that where the very question is the intent of the parties, and certainly that is the heart of any contract, to be bound by that you have a right to ask questions on intent. In this recent California case it is stated:

"The general rule is well settled that, under our system, a witness may be examined as to the intent with which he did a certain act, when that intent is a material thing in the action,"

(Testimony of R. T. Adams)

and the intention of the bank at the time it signed that modification to avoid the Borah Act, now attempted to be construed as something else, is the very gist of the matter.

"A jury or trial judge is not bound, of course, to believe the witness when he says he did not have a certain intent, but may find in the circumstances, actions and language an entirely different intent, but [63] the testimony of the witness is competent and relevant and not immaterial. So in this case, as we pointed out, the direct testimony of the defendant as to his belief, motive and intent in making the criminal charge was competent evidence on the question of malice in fact, and pertinent also to his defense of the existence of probable cause for the prosecution."

The other case I cited this morning, Howell versus Mays, 107 Cal. App. at 751 dealt with the intention with which a certain deed was executed. Now, here is a stipulation which is just as valid to us as a deed. What was the intent?

The Referee: If there was a stipulation why wouldn't the stipulation reveal it?

Mr. Shelton: Because, your Honor, it has been distorted in my opinion already once and we have been already notified by Mr. Lynch that it will be again and we want the evidence now in this record if it goes up on appeal, we want a record made that will show the intent of the bank at the time the contract was modified, that there was just one purpose to it and that was to avoid the Borah Act.

Mr. Lynch: I think the agreement is before the Court. It had the approval of the court, was approved by Judge McCormick, and I do not think it is proper at this time

(Testimony of R. T. Adams)

to take testimony on what the intent of the parties was in signing it. [64]

The Referee: You can prove the intent of parties by asking what was in their mind at the time, or can you do it by showing what was said and done?

Mr. Shelton: That is true as well as asking their express intent.

The Referee: It would be a new rule of evidence to me to ask a man what his intent was. I think you can show his intent by showing what he said and did.

Mr. Shelton: Just as this case says, that a jury or trial judge is not bound of course to believe the witness. He can be cross-examined on this and we would invite a wide cross-examination to see whether or not his intention was consistent with what was said and done at the time. We do not think there is any question but what they have the right to do that. Theoretically you might show this man's intent was cooked up since.

The Referee: If that were true you would have witnesses testifying all the time what was in their mind at the time a certain thing was done.

Mr. Shelton: It is only where there is ambiguity or where uncertainty arises.

The Referee: What is uncertain about this?

Mr. Shelton: In this, that another court picked upon the omission of that language, to-wit, the Circuit Court inferring that as to the actions of an attorney hired, a special attorney for the preservation of assets, that the [65] omission of that language showed the intent on the part of every one to subject certain of these assets to the payment of this expense. Now, it does not say so and the contract negatived that but the court said otherwise, and Mr. Lynch said he was going to stand on an expression of

(Testimony of R. T. Adams)

opinion by that court. This is the first time we have had an opportunity, when this agreement comes up for express construction, to negative any possible construction of that kind and we have a right we think to introduce evidence to show that.

Mr. Lynch: There has been no proof of any uncertainty or ambiguity in this contract that I know of.

Mr. Shelton: The contract is before the Court.

Mr. Lynch: The Court has not found it to be ambiguous.

Mr. Shelton: The Court has listened to your statement.

Mr. Lynch: That is supported by the decision of the Circuit Court of Appeals.

The Referee: Mr. Lynch, if there was an uncertainty in it are you in agreement with Mr. Shelton or the Court as to how it should be established?

Mr. Lynch: It is my opinion it should be established by what occurred and what was said, and not the party's private opinion.

The Referee: What is your opinion, Mr. Cahill?

Mr. Cahill: I share the same view as Mr. Lynch. I think this is one of the closest cases I have ever seen to [66] attempting by parol evidence to vary the terms of a written instrument. As far as ambiguity in the part sought to be changed, it arose from nothing in the order now made but something that was in the order not approved by the Court.

The Referee: What is your view of it, Mr. Nelson?

Mr. Nelson: I do not agree with Mr. Cahill's view that this language was part of a court order. The court made an order approving the agreement and the parties have reached the agreement with reference to the loans

(Testimony of R. T. Adams)

and security and the court approved it, but I think it speaks for itself.

The Referee: What I mean is, where there was an uncertainty do you believe that should be established by asking a witness what was in his mind at that time, or should it be established by what was said and done?

Mr. Nelson: Normally it would have to be established by what was said and done, of course that would be the general rule. However, when an agreement is ambiguous these cases Mr. Shelton has referred to, the court has found that difference. A party to an ambiguous agreement may testify as to what he thought the agreement meant. What he intended to say in the agreement is self-serving and the Court would have to weigh it in the light of all other facts and circumstances connected with it. Suppose an agreement is drawn by two people and it is drafted and one fellow thinks it means this and the other that and they sign it and there is a mutual misunderstanding as to the intent. [67]

The Referee: But where there was something said and done there, to put it differently.

Mr. Nelson: Then it could be shown by way of impeachment or cross-examination.

Mr. Shelton: Or by affirmative testimony.

Mr. Nelson: That is right. I think the rule is sound, but whether it applies here, I don't know.

Mr. Lynch: There is no showing of any ambiguity.

Mr. Nelson: On that part I think there is something to be said in support of this view. After all, the intent of the agreement is perhaps clear enough on its face for our purposes here.

Mr. Shelton: Well, the position that has been taken by the adverse parties in this matter—of course, I do

(Testimony of R. T. Adams)

not agree with the decision in the Neblett fee case, I do not agree that determines the construction of this contract.

The Referee: I did not in the beginning but I have to now.

Mr. Shelton: That again remains to be seen, so if that idea persists in your mind you yourself have admitted the ambiguity and uncertainty in this contract we are now contending for. Bear in mind, when that court ruled upon this every one thought this agreement was so plain and unambiguous there was no possible misconstruction in it. Now, by that decision coming in even the Court says he is [68] inclined to think, although once he did not think there was some ambiguity, that today there is.

The Referee: Well, I decided the Neblett matter more on another issue, and that was he wrote a letter if he got \$10,000 he would not call on the bank for any other money. That was the principle on which I denied his claim payable. I think had it not been for that letter I would have held that the bank would have had to pay the Neblett claim because he did render service that the bank benefitted from, and in the absence of that letter I would have held that his fee was payable out of the funds that would have otherwise gone to the bank, but he had written a letter, as you recall, saying that if he got \$10,000 at the time he wrote the letter he would not call on the bank for any more money.

Mr. Shelton: That is correct.

The Referee: I decided it on the theory that by signing that letter he had waived his right to pursue the bank for any other money.

Mr. Shelton: Yes, that and I think the other principle was announced in your decision, too, that these funds had

(Testimony of R. T. Adams)

And we have substantially the same thing in the Third Circuit in the case of Miner's Savings Bank of Pittston, Pennsylvania *et al* versus Joyce, 97 Federal Second at 973, which reversed the Pennsylvania District Court. There the Circuit Court said:

"We think the true rule to be that, where a trustee sells a bankrupt's property free of liens, with the consent of the lienholders, the latter are chargeable not only with the actual costs of sale but also with expenses reasonably incurred in the preservation of the property."

They cite the case of Virginia Securities Corporation versus Patrick Orchard, in the Fourth Circuit.

"This of course is not to say that the lienholder should not bear the reasonable expenses of preserving the property, which expenses were clearly for its benefit.

We conclude that the proceeds of the sale of the mortgaged property, as well as the net rents received therefrom after the deduction of expenses applicable [72] thereto, should be devoted to the payment of the costs of sale, the commissions of the trustees and the referee applicable thereto, and the reasonable expenses of preserving the property, and that the balance thereof should be applied to the payment of the liens in the order of their priority, including the lien of the mortgage."

Then we come down to the Virginia Securities Corporation versus Patrick Orchards. That is a Circuit Court of Appeals case for the Fourth Circuit, decided in 1927 and reported in 20 Federal Second at 78, and affirms the District Court for the Western District of Virginia. The Circuit Court said among other things—first I will go back there to say the bankrupt was an orchard company whose assets consisted of six large apple orchards.

(Testimony of R. T. Adams)

It was adjudicated a bankrupt on a voluntary petition in bankruptcy and the trustee sold the bankrupt's property without objection by the lien creditors. The right of the trustee to charge costs and expenses of preserving the property between the date of the bankruptcy and delivery to the purchaser against the purchase price was questioned by the secured creditors, who had in each instance acquiesced in the trustee's incurring the expenses.

This is what the court says:

"Where the expense has been incurred wholly for the benefit and advantage of the mortgaged property, as also [73] is the case here, such expenditure is properly chargeable against it, and particularly is this true where the mortgage or lien creditor voluntarily chooses to avail himself of the administrative functions of the court in bankruptcy to realize on his security."

It was necessary that the property should be sold and pending its sale that it should be preserved. Proper orders looking to the sale of the property had to be drawn and presented, and the property in the meantime had to be maintained in a high state of cultivation, in order to preserve it from serious deterioration and loss. All of these things were for the benefit primarily of the lien-holders, who had invoked the aid of the court in the collection of their debts. By coming into bankruptcy, they lost none of their rights; but when a lien creditor avails himself of the instrumentalities of the court in the enforcement of the lien, then the proceeds of the property upon which the lien exists, may be charged with the expenses necessary in the enforcement of the lien as well as in the preservation of the property."

(Testimony of R. T. Adams)

There are other cases cited. Now, that is exactly what has happened here, the lien creditor came into this court and let the Trustee develop an oil well to the great benefit of the mortgage holder and in so doing an expense of some Federal income tax came on. Those arose solely because the [74] Trustee functioned most profitably in his preservation of the property, and clearly the matter of intent would have little place here when it is so well known what has been done, that this creditor, this secured creditor has permitted this property to be administered by the Court. It has been an assistance to the Court and the consequence was that there was an income tax that has arisen.

As I said in the beginning it seems to me that this we are engaged in now is why the Trustee should not pay the income tax, and what may have been put in it or taken out of the agreement by counsel for the Trustee and what the bank thought the purpose in doing that was is just beside the point.

Mr. Shelton: I think it would be enlightening for the Court to know what the answer is to such an argument as that. I won't go into the law although we think it is clearly decided by the Ninth Circuit in a very recent case.

After all, we did not seek the bankruptcy court to administer this property. The bankruptcy court stepped in and prevented the foreclosure of a lien on this property and barred the secured creditor from his right and has continued to bar him from his right of foreclosure for a period of two years. Then in lieu of pressing for that foreclosure to which it had a right, together with all the rents, issues and profits from the property, this Trustee went to the bank and said, On certain considerations if you will [75] forego asking for further foreclosure now,

(Testimony of R. T. Adams)

if you will then accept certain payments over a period of years and give us an opportunity, for the benefit of our general creditors and ourselves to administer this thing we will do two things:

We will undertake to do that, and we will sequester for you as part of your security and payable over to you all of the rents, issues and profits of this property, including that of the oil.

Now, it has been held repeatedly where sequestration has been asked and where it has been accorded that the trustee in bankruptcy at that time becomes not only the agent in a way for the unsecured creditors but the custodian of the rents, issues and profits for the secured creditor, but while in his hands they do not become part of the assets of the bankruptcy court and they are not charged with the expenses of administration. Now, we think when the time comes to put in a brief we can show you the cases to the present day, both Federal and California.

The Referee: Would it make any difference in the admissibility of this testimony as to whether or not the Collector, for the purpose of this proceeding here, as to whether or not the Collector of Internal Revenue was a party to this agreement?

Mr. Shelton: Well, at that time the Collector of Internal Revenue had no claim, he was not even a creditor [76] of this estate. He was not a party to the bankruptcy. When this security was sequestered for the benefit of the bank the Government had no claim. Now, if a claim arises subsequent to that time they cannot reach into the pocket of the bank and take out the moneys theretofore sequestered for the payment of debts, to pay nothing

(Testimony of R. T. Adams)

but a claim of administration. To do so you are taking property without due process and you are violating the terms and conditions of a contract given, and this contract, bear in mind, is a little more sacred than the average contract. It is a contract made with the Court itself, and the language of the Appellate Court cases are to that effect, that a sequestration agreement of this kind is an agreement with the court.

The Referee: In what way is this contract unintelligible?

Mr. Shelton: Uncertain?

The Referee: Yes.

Mr. Shelton: For the simple reason that—well, that will undoubtedly be urged in the briefs, that it means something it does not say. In other words, that by taking out a little phrase in this contract to meet the Borah Act, and this is the phrase that is taken out, and I called the Court's attention to it when I was talking to Mr. Adams this morning and asked the question, this clause was taken out: "nor charged with the payment of any of the expenses of administering said bankrupt estate, and nothing herein [77] contained shall prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee."

"Nor charged with the payment of any of the expenses of administering said bankrupt estate." That is only a redundant clause, a provision in the clause at best. It only goes one step further and says what the contract says in plain and unambiguous language up to that point.

Now, the contention is by this modification the bank suddenly changed its position it held all the way through

(Testimony of R. T. Adams)

in this case and that for some reason or other we agreed expenses of administration, including the expense the Government now claims, would come out of this fund. Now, it is that situation, that uncertainty which has been already announced by Mr. Lynch himself and referred to by the Court on the bench that we are offering this evidence on to make it absolutely clear that by the elimination of that phrase it was for one purpose only, the elimination of the Borah Act which did not permit agreement for fees. It was no intention whatsoever ever to give up any right we had so consistently claimed and protected up to that point.

The evidence is offered on that point.

Mr. Harpole: Where does the Borah Act infringe on our tax liability?

Mr. Shelton: I don't think the Borah Act does infringe on your tax liability, if you get the point. The Borah Act [78] was a criminal act that had just gone on the statutes.

Mr. Harpole: I think I understand the Borah Act. That prohibits making a contract in advance for attorney fees.

The Referee: It goes further than that. It prohibits any agreement or any attempted agreement between any of the parties in interest for any fees.

Mr. Shelton: Yes, for any fees.

The Referee: The Borah Act does not prevent an agreement for the incurring of expense. Of course, the situation here is this was not such an expense as that. This is an item of expense, if at all, incurred by legislative enactment.

(Testimony of R. T. Adams)

Mr. Nelson: And that is the vital difference between this case and the San Bernardino case. The money he spent was applied to the preservation of the property, and I think there is a great deal of difference between that and administration expenses or tax liabilities derived from the general administration of the estate. In my view, tax claims have about an equal right with other general expenses. I cannot urge here that it is a surcharge against any particular fund.

Mr. Shelton: Now in a way you will find in this proceeding, this one before your Honor now and the subsequent proceeding it will come up in the same way, my good friend Mr. Lynch is seeking to ride in a way on the coat-tails of the Government. [79]

Mr. Lynch: It may be rough riding.

Mr. Shelton: We are all ahead of you. Mr. Lynch has already said the language of a certain case we had before us had something to do with that. Now, that is a different story and the position taken on the question of uncertainty that has arisen, we ask now to eliminate that uncertainty as to whether there was any intention on the part of the bank at the time it was made to subject the assets to the costs of administration.

The Referee: Of course, this Court would not give the bald expression of what the witness might state was in his mind at the time he signed the agreement a great deal of weight unless he fortified it with the circumstances and what was said and done, and the facts surrounding it. The Court would determine the question of intent more from the facts and circumstances surrounding it than he would by the mere expression of the witness as to what he states now was in his mind at that time.

(Testimony of R. T. Adams)

Mr. Shelton: I want that, too, and I think it will bear out what the witness will testify to. We want it and I will call one of the witnesses now in the court room on that point.

The Referee: I will permit the witness to answer the question because I think there is less likelihood of injecting error in the record by permitting him to answer than there would be if I did not. I cannot see any particular [80] harm that could come to the other side by any answer this witness might give.

Mr. Harpole: Whose party is this now? Is this the trial on the tax claim?

The Referee: It is the trial on the tax claim.

Mr. Harpole: Or is it giving Mr. Lynch a free ride on account of his attorney fees?

The Referee: The Court is not considering that angle at all at this time.

Mr. Shelton: Do I gather from the Court's remarks that although he is going to permit the witness to testify it is not going to make any difference with him anyhow?

The Referee: I have indicated the Court would not give very much weight to an opinion of a witness or a statement of the witness as to what was in his mind unless he can back it up by something said or done that in the Court's mind would create such an impression.

Mr. Harpole: Let me further object on the ground there is no foundation laid for the asking of any expression as to the payment of income taxes, there has been nothing to indicate they had any intention about income taxes. It might make a great difference to the Government about who paid the tax.

Mr. Shelton: I am not going to ask him about income taxes, but I will have the question read. I don't think

(Testimony of R. T. Adams)

anybody was worried about income taxes at this time,
Mr. Harpole. [81]

Mr. Harpole: Then I think that is the proof that it
is immaterial.

Mr. Shelton: No. That has come up since then.
Will you read the question, Mr. Olson?

(Whereupon the reporter read the pending question as follows: "Q. By the omission of that phrase in the amendment thereto was there any intention at that time on the part of the bank to subject the property or the income from the property subject to this trust to administration expenses?").

A. No, definitely there was not. That had been the basis all the way through, that we would not enter into this contract unless the cost of administration was behind—

Mr. Harpole: Just a minute. We object to that as not responsive to the question.

The Referee: That is correct. Objection sustained.

Mr. Shelton: Well, your answer to the question is what now? A. No, that we would not.

Q. Now, Mr. Adams, at that time there had been discussions with the other parties to this contract prior to this as to what position the bank would take on the payment of expenses? A. Yes, over a period of months.

Q. Including discussions with the Referee here present?

A. Yes. [82]

Q. And you recall you had conferences with the attorneys for the Trustee? A. Yes.

Q. Messrs. Bailie, Turner and Lake?

A. Yes.

Q. And for the Receiver at that time?

A. Yes, sir.

(Testimony of R. T. Adams)

Q. Did you have a conference at that time with Mr. Cahill, for the bankrupt? A. Yes, sir.

Q. And who were present at most of those conferences for the bank, who took part in those conferences?

A. You, as our legal counsel, and myself.

Q. Was anything said at any of these conferences regarding the question of the payment of administration expenses out of income?

Mr. Harpole: Objected to as immaterial.

Mr. Lynch: Objected to as immaterial and an attempt to vary the terms of a written contract, and that the agreement itself is the best evidence and any conversations or anything preceding that merged in the agreement.

The Referee: Will you read the question?

(The reporter read the pending question.)

Mr. Shelton: The Court suggested that the facts and circumstances that lead up to that would be the most persuasive evidence. [83]

The Referee: Is the question confined as to time?

Mr. Shelton: The time could hardly be isolated other than tying it into the previous conversations.

The Referee: Well, if you will fix the time and place at about the time of this amendment I will permit him to answer.

Mr. Shelton: Q. Well, were you in court at the time the matter was presented to Judge McCormick on the approval of this contract? A. Yes, sir.

Q. Do you recall the occasion on which—

The Referee: Let him state what happened.

Mr. Shelton: I just wanted to fix the time now.

Q. Do you recall the occasion in the court when this question of the Borah Act came up? A. I do.

(Testimony of R. T. Adams)

Q. Had the contract theretofore been approved once by Judge McCormick? A. I believe it had.

Q. And at the time this question of the Borah Act came up for discussion in open court, was it—

A. Yes.

Q. —was it before Judge McCormick?

A. Yes, sir.

Q. And do you recall at that time Mr. Lynch and Bailie, Turner and Lake were present? [84]

A. I do.

Q. And was Mr. Bailie present?

A. I believe Mr. Bailie was present.

Q. And Mr. Cahill? A. Yes.

Q. And myself? A. Yes.

Q. Do you remember who was present on behalf of Mr. Neblett's office at that time?

A. Mr. Neblett himself was present.

Q. He was present, was he?

A. I believe he had some one else with him but he also was personally present.

Q. There was another man representing him that day. Do you remember Moseley Jones was there? Do you remember he made the statement, or do you recall?

A. I don't recall.

Mr. Shelton: My recollection is Moseley Jones was present at that time.

The Referee: But you are not testifying. You are trying to. That is why I said to let the witness answer the questions.

Mr. Shelton: You may refresh the memory of your witness, your Honor.

Mr. Cahill: Take him out in the corridor to do that.

(Testimony of R. T. Adams)

Mr. Shelton: I do not practice that way. [85]

Q. Well, what was said on that occasion, if you recall the substance of what was said before Judge McCormick regarding the modification of this contract before approval?

Mr. Harpole: That is objected to as immaterial and not the best evidence.

Mr. Lynch: The Trustee objects on the ground it is immaterial and not the best evidence.

The Referee: Objection sustained; no foundation laid showing it to be the best evidence.

Mr. Shelton: I beg your pardon?

The Referee: There has been no foundation laid to show it to be the best evidence.

Mr. Shelton: Well, the argument took place in court orally, did it not? A. Yes, sir.

Q. In the presence of every one? A. Yes.

Q. And you heard it? A. I did.

Q. Did you hear what was said that day by Judge McCormick and the other attorneys present?

A. I did.

Q. Do you recall at that time what Judge McCormick said?

Mr. Harpole: That is objected to as immaterial and not the best evidence. [86]

Mr. Shelton: Q. (Continuing) Regarding the modification of this contract?

Mr. Harpole: I submit what the court did is the only test.

The Referee: Objection sustained. No foundation is laid.

(Testimony of R. T. Adams)

Mr. Shelton: Q. Now, you personally, before signing this modification you did not have any personal contact with the attorney for the Trustee?

A. No, sir, not in regard to this particular modification.

Q. Not in regard to this particular modification?

A. No.

Q. And that was the last modification before the approval of the contract? A. I believe that is correct.

Mr. Shelton: I think that is all.

Cross-Examination

By Mr. Harpole:

Q. In any of your conversations did you say anything about income taxes that might accrue from the operations on the properties of the F. P. Newport estate upon which the bank had a mortgage?

Mr. Lynch: Objected to as immaterial whether he did or did not. [87]

The Referee: Read the question. (The reporter read the pending question.) Objection overruled.

A. I don't recall any, Mr. Harpole.

Mr. Harpole: Q. Do you recall any one representing the Department of Internal Revenue being present at any of those conversations? A. No, sir.

Mr. Harpole: That is all.

Mr. Shelton: Now I would like to interrogate the witness further about these conversations; it having been opened up by counsel I think I have a right to go into that.

Mr. Harpole: That is only on cross examination.

Mr. Shelton: There has been no testimony about them other than what you brought out.

The Referee: You may inquire.

(Testimony of R. T. Adams)

Redirect Examination

By Mr. Shelton:

Q. These conversations you said where nothing was said about income taxes, was the payment of expenses of administration discussed in those conversations?

A. Yes, it was.

Mr. Harpole: Objected to on the ground it is wholly immaterial.

The Referee: Well, it is leading. Objection sustained.

Mr. Shelton: That is all. [88]

The Referee: Mr. Adams, you said this matter was discussed in the presence of the Referee. When was it discussed in the presence of the Referee?

A. I assumed by that question, was it discussed in open court here in your presence.

Q. Well, it was not, was it? This amendment came up after my certificate on review was filed.

A. It is possible I misunderstood his question. I took his question to mean the whole question of the contract, the costs of administration and so on which was discussed before your Honor.

Q. But this question of this amendment that Mr. Shelton has been talking about and that he has read a time or two took place on the first instance on a review before Judge McCormick, did it not?

A. That is correct, yes, sir.

Mr. Shelton: Your Honor, Mr. Adams did not testify that matter was discussed before you. We were laying then a foundation for conversations we had had theretofore on the contract. I do not want you to get that impression.

(Testimony of R. T. Adams)

The Referee: I did not understand any conversation was called for except in relation to this amendment you have been reading about.

Mr. Shelton: Oh, no.

The Referee: Had I known the testimony was to go into things generally I would have sustained the objection. [89]

Mr. Shelton: Well, you did finally sustain the objection. The question directed to him and when your Honor ruled we could put in his opinion on it but that it would weigh lightly, I thought that gave me the privilege of putting in the circumstances which led up to it.

The Referee: We were talking, as I understood, about the amendment that took place before Judge McCormick.

Mr. Shelton: Yes, but the amendment before Judge McCormick cannot be thoroughly understood without you have the conversations and negotiations of the parties leading up to the contract prior to that, and that is the theory on which they are offered, your Honor.

The Referee: Well, you may proceed, gentlemen.

Mr. Shelton: You have ruled out and sustained objections to that line of testimony.

The Referee: Which line of testimony?

Mr. Shelton: That I cannot ask questions regarding conferences between the respective parties prior to the conference—

The Referee: You do not contend the whole contract is incapable of being understood without explanation?

Mr. Shelton: No, but it all depends on this one change that we are talking about, the whole history—

(Testimony of R. T. Adams)

The Referee: No, I won't go into anything other than the question of the amendment, any conversation with respect to anything else. You might be writing an entire [90] new contract.

Mr. Shelton: Well, that is all, Mr. Adams, at this time. Now, Mr. Harpole has introduced by reference the contract, supplemental contract and modification thereof, I believe. Isn't that correct?

Mr. Harpole: Yes.

Mr. Shelton: Well, we think for the benefit of the complete hearing that any subsequent stipulations which modify that contract and are in the record should also be introduced into evidence and we would like now—there were several other postponements of times of payment and modifications of that contract.

The Referee: Well, I do not recall any others other than those mentioned by Mr. Harpole, but if there are others the Court will consider them.

Mr. Lynch: They are all in the record. One or two of the last ones extending time to pay obligations, make certain payments, are not in the record at all.

Mr. Harpole: Payments to whom?

Mr. Lynch: To the bank.

The Referee: That would not be material on Mr. Harpole's claim anyway.

Mr. Lynch: I do not understand it would be.

Mr. Shelton: I do not think myself those would be very material to the decision on his issue.

Mr. Lynch: I think we can probably all stipulate that [91] under the contract as extended and modified and all those stipulations the full amount of the indebtedness is

now owing—all extensions have expired. There was no extension beyond September 7, 1940.

The Referee: But Mr. Lynch, regardless of any stipulations or extensions and so forth, that would not be material in determining the question involving Mr. Harpole's right to these proceeds.

Mr. Lynch: I see no materiality in it at all.

The Referee: I do not either.

Mr. Shelton: Mr. Burch is uncertain about the stipulation modifying the agreement of January 12 being offered in evidence by Mr. Harpole. May it be deemed all stipulations which modify the contract of January 12 and the supplement thereto may be deemed in evidence?

Mr. Harpole: No, not unless I know what you are referring to.

Mr. Shelton: They are the ones you purportedly put in evidence but Mr. Burch thinks there are some extra ones.

Mr. Lynch: There are some extra ones not in the transcript and therefore not put in by him.

Mr. Shelton: I want to be sure we have those in.

Mr. Harpole: Name them, then.

Mr. Cahill: I am prepared to give the dates if you wish: Modification stipulation dated October 14, 1937; modification stipulation dated October 29, 1937. Those two were [92] placed in evidence.

Mr. Lynch: There are three additional ones, I think.

Mr. Harpole: A supplemental agreement of August 31, 1937.

Mr. Shelton: Yes, that was approved by Judge Utley. You offered that this morning.

Mr. Harpole: Yes, and I will offer it again to make sure.

The Referee: It is in. It is marked your exhibit number two, one of your exhibits marked number two.

Mr. Lynch: In addition to those I think there are three further stipulations entered into between the Trustee and the bank.

Mr. Shelton: All right. Do you have those stipulations?

Mr. Lynch: I do not have them with me.

Mr. Shelton: Well, I have this stipulation on modification of contract of January 12, 1937, dated the 14th of October, 1937. That dealt with the sales of real property, and the stipulation—

Mr. Lynch: You won't have those in the transcript.

Mr. Shelton: Stipulation re modification. I am talking about these main stipulations. Supplemental agreement dated August 31st, which was dated—

The Referee: Will you give me those dates again on those you are now offering? The October 14th stipulation modifying the agreement of 1937 is in already. The one of [93] October 29, 1937, that stipulation is in and the modification of the supplemental agreement of August 31st is in.

Mr. Shelton: Then the one by Judge McCormick, the one that was in front of him. That was dated when?

Mr. Lynch: That does not bear any date but it was October 29th.

Mr. Harpole: The one of October 29, 1937 that I referred to is one that was approved by Judge Paul J. McCormick and provided all moneys must be paid to and disbursed by the Trustee in Bankruptcy in order to comply with the bankruptcy law.

Mr. Lynch: It actually for some reason or other was not dated.

The Referee: You refer now to the order of Judge McCormick approving the stipulation?

Mr. Harpole: I am identifying the stipulation by commenting on the order the Judge made.

Mr. Shelton: Well, I think they are all in, your Honor.

Mr. Lynch: Although I do not see its materiality here, Mr. Shelton, there were three additional stipulations made between the bank and the Trustee.

Mr. Shelton: Oh, yes, you mean subsequent thereto?

Mr. Lynch: Yes.

Mr. Shelton: Oh, yes, that is true.

Mr. Lynch: Just extending time of certain payments.

[94]

Mr. Shelton: Now, at this time, your Honor, I offer to take the stand and testify myself that at the time this last stipulation modifying the agreement of January 12th to avoid the Borah Act, that I had a conversation with the attorney for the Trustee, Mr. Norman Bailie; that when he prepared that and I found one clause had been left out in order to avoid the Borah Act I asked him whether in his opinion the removal of that clause in any wise subjected the income that had been sequestered for the bank to the payment of administration expenses, and he said no. He agreed with me that the contract was perfectly clear as it was, and on that understanding we signed the stipulation. As I caught the fact he had left it out—why he left it out I did not know, but I called his attention to the fact it was a redundant clause and I did not want to take any more time about it—it had been delayed then too long, and that if he would agree with me he would sign it that I would, and he said he did agree with me.

I can offer that statement as the testimony I would give.

The Referee: Are you asking counsel to stipulate you would so testify?

Mr. Shelton: I would like to get their stipulation, subject to their objection as incompetent, immaterial and irrelevant.

Mr. Harpole: I am unable to stipulate because I don't [95] know anything about it, and I object to it as immaterial to the issue of the tax claim.

The Referee: You may take the stand and testify.

W. C. SHELTON,

called as a witness in behalf of the Security-First National Bank, being first duly sworn, testified as follows:

The Witness: I recall very distinctly the proceedings—

Mr. Harpole: Just a minute. I want to object. You better ask yourself your question.

The Witness: This is subject to being stricken out.

The Referee: State your name?

A. W. C. Shelton.

Q. And your address?

A. 1519 North Kenmore Avenue, Los Angeles.

Mr. Cahill: I believe you are an attorney at law?

A. Yes, attorney at law, licensed to practice before this court.

Mr. Harpole: Do I understand the Court will permit Mr. Shelton to make his statement?

The Referee: He can go ahead and start and if there is any objection you can assert them.

The Witness: I would suggest, your Honor, the proper method would be to move to strike it out if it is not competent. I will hold myself entirely to the conversation regarding the modification— [96]

(Testimony of W. C. Shelton)

The Referee: I think if counsel were asked questions we would get along better.

The Witness: Mr. Burch, will you take over.

Direct Examination

By Mr. Burch:

Q. Mr. Shelton, did you have a conversation or conversations with Mr. Norman Bailie in the Federal court prior to signing the modification agreement?

A. I did.

Q. State who was present?

A. Mr. Bailie and myself.

Q. Please give us the conversation.

Mr. Lynch: Objected to on the ground it is wholly immaterial, incompetent, and obviously offered at this time in an effort to modify the terms of a written agreement, not the best evidence, self-serving.

Mr. Harpole: I object as a self-serving declaration.

Mr. Lynch: And no proper foundation, in that there has been no showing that there is any ambiguity or uncertainty in the agreement itself.

The Referee: Objection sustained.

(The witness leaves the witness stand.)

Mr. Shelton: Then let the record show at this time that the offer is made of testimony to show the statement [97] of counsel for the Trustee made to Mr. W. C. Shelton, attorney for the bank, that the omission of the phrase regarding the payment,

"nor charged with the payment of any of the expenses of administering said bankrupt estate, and nothing herein contained shall prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee,"

(Testimony of W. C. Shelton)

that it was stated by Mr. Bailie would not in any wise subject the income in the hands of the Trustee to the payment of expenses of administration. I asked him whether it would and I told him I did not want to make an objection to it unless he differed with me and felt it did change it.

Mr. Lynch: We object to the offer on the same grounds as we objected to the question.

The Referee: Objection sustained.

Mr. Shelton: That is all.

The Referee: Any further evidence on the tax item?

Mr. Harpole: Is Mr. Gribble here?

Mr. Lynch: Yes. Come forward. [98]

J. B. GRIBBLE,

called as a witness in behalf of the United States of America, being first duly sworn, testified as follows:

Direct Examination

By Mr. Harpole:

Q. Mr. Gribble, where do you reside?

A. 6149 Glen Alder, Los Angeles.

Q. What is your occupation?

A. Bookkeeper for H. F. Metcalf, Trustee.

Q. How long have you been bookkeeper for H. F. Metcalf, Trustee? A. Since March, 1935.

Q. Do you have with you a record of the payments made by H. F. Metcalf, as Trustee of the F. P. Newport Corporation, Limited, the bankrupt, to the Security-First National Bank?

A. I merely brought the total that was made between March 15, 1939, to date.

(Testimony of J. B. Gribble)

Q. Will you tell us the total that has been paid between March 15, 1939, to date?

A. On principal payments, \$579,335.76.

Q. And how much on interest?

A. \$153,234.47.

Mr. Harpole: That is all.

The Referee: Are you able to state from what source [99] the principal amount of those funds came, Mr. Gribble?

A. The majority of that payment would come from the oil fund. Some of it occurred from the sales of property which would be authorized by this Court.

Q. And the oil funds you refer to came from this nine acres on the harbor?

A. Yes, sir. I thought of segregating that but I did not have time to do that, your Honor.

Mr. Lynch: You can take the sixth account filed by the Trustee and determine from that account how much has been paid out of the oil revenue, that is, royalties from the Universal Consolidated Oil Company, and how much has been paid out of sales of real property, can you not?

A. I would have to check that to make sure on that. I have it here and I will do that and let you know in a minute or so.

Mr. Shelton: Just a minute, Mr. Gribble. Before you leave the stand I want to ask you, you are also able to testify, are you not, how much of the funds that have been received from oil and how much of the funds that have been received from the sales of property have been paid over to the Trustee with the consent of the bank out of the proceeds received?

A. I could by examining the books, but I do not have that record with me.

(Testimony of J. B. Gribble)

Q. You could get that tomorrow? [100]

A. Yes, sir.

Mr. Lynch: You mean paid out or retained by?

Mr. Shelton: Retained by or paid out to pay certain expenses, with the consent of the bank.

Mr. Lynch: Mr. Gribble, I am not so much interested in that in this particular hearing, but I think it would be advisable if you will, if you will examine the sixth account so you can testify in a few minutes as to the amount that has been paid from the Universal Consolidated Oil Company royalties and the amounts from the sales. Will you do that?

A. Yes, sir.

The Referee: Mr. Gribble, what was the total amount of the last monthly check received from the oil company?

A. I received it yesterday and it was in the neighborhood of \$6175. That is just approximately. That is within a few dollars.

Q. And has the monthly check each month always been that large?

A. Many months larger; not always that large.

The Referee: That is all.

Mr. Lynch: That is all I have at this time.

The Referee: Let me ask you this question:

Q. Has there been any recent noticeable reduction in the amount of the monthly checks from the oil receipts?

A. No, they have been averaging in the neighborhood of \$5,500 to \$6,000 for several months past. [101]

Q. There has not been any noticeable decline in the amount received?

A. No, sir.

Mr. Shelton: Q. Over what period of time?

A. Several months last past.

Q. Since the wells came in there has been a very substantial decline?

(Testimony of J. B. Gribble)

A. There has been a very substantial decline since they first came in, but since the first of this year, I would say in the neighborhood of fifty-five hundred to six thousand dollars average with possibly one exception when it was around \$5,000, except, your Honor, once in a while the Universal Consolidated makes deductions for taxes which are allocable to the thirty-five per cent royalty and that does not come to us. We get the net check.

The Referee: You mean the Government is getting two cuts out of this?

A. No, that is the State and County tax, the mineral rights taxes.

Mr. Harpole: Why should the Federal Government have the bankruptcy court collect State and County taxes and not Federal income taxes?

The Referee: Any further evidence?

Mr. Lynch: No, subject to having Mr. Gribble's further testimony.

The Referee: On this particular matter is there any [102] further testimony?

Mr. Lynch: I would like to have that testimony go in and I can do it in a very few minutes.

The Referee: Very well.

Mr. Lynch: We might have a short recess at this time, and I may have it ready for your Honor.

The Referee: Very well.

(Recess.)

The Referee: You may proceed.

Mr. Lynch: Q. Mr. Gribble, you now have the approximate amount that was paid to the Security-First National Bank from the royalties received from the Universal Consolidated Oil Company?

A. You asked me just two minutes too soon.

(Testimony of J. B. Gribble)

Q. I will put it the other way around. Do you have the amount paid to the Security-First National Bank out of sales of real property?

A. Out of sales of real property, \$156,877.33.

Mr. Lynch: That is all as far as I am concerned.

The Referee: Q. Have you received any other income than from the sale of real property and oil?

A. Not that has been paid to the bank.

Q. How about rentals?

A. The rentals, your Honor, have been used for office expenses as per the stipulation that \$7,000 a year be allowed, [103] and that was for a couple of years.

Mr. Lynch: That is all.

Cross-Examination

By Mr. Shelton:

Q. Now then, since the notice given to Mr. Metcalf on August 3, 1943, revoking any further acquiescence in the use of surface rentals those surface rentals have been paid in to the Trustee and put into a special account?

A. Yes.

Q. And is the statement that that amounts to about fourteen hundred dollars odd correct, or have you that amount there? A. That is about \$1400.

Mr. Lynch: \$1495.02? A. Yes, sir.

Mr. Shelton: Those are surface rentals?

A. Yes, sir.

Mr. Lynch: Q. Mr. Gribble, I show you a statement purporting to be a statement of the amounts in the various accounts. That was prepared by you? (Handing to the witness.) A. Yes.

Q. And the amount shown on this statement in the general account, \$4,181.57, of which \$156.57 is unallocated? A. Yes, sir. [104]

(Testimony of J. B. Gribble)

Q. And in this special account at the Citizens National Trust and Savings Bank to which Mr. Shelton just inquired, is \$1495.02? A. Yes, sir.

The Referee: That is for rentals?

A. That is rentals that have accrued since the time of the Security-First National Bank notice, along the first part of August, 1943.

Q. How about the oil account?

A. In the special oil account there is a balance at the present time of \$22,980.19. I expect to have to get a check out of that for real property taxes in the next few days.

Mr. Lynch: Q. In other words, the real property taxes? A. On the trust property.

Q. On the trust property subject to the lien of the bank, they are unpaid and due by the 5th of December, is that correct? A. Yes.

Q. And you expect to make some arrangements to get that advanced and paid if everybody is willing?

A. Yes.

Mr. Lynch: Mr. Harpole, I assume as far as the Government is concerned they would have no objection to our paying out of that account the real property tax assessed against this property? [105]

Mr. Harpole: During administration?

Mr. Lynch: Yes.

Mr. Harpole: Yes, surely. We object to anything except on a pro rata basis.

Mr. Lynch: I anticipated that.

Mr. Shelton: I do not see the Government has anything to lose by that. I know the bank wants to save everything they can for everybody here and I am sure there would be a stipulation on our part to do that.

(Testimony of J. B. Gribble)

The Referee: Well, I will settle that question right now, gentlemen. I think the Court will direct the payment of the taxes out of that fund regardless of the objection for the reason I know there are other sales of real property coming on which would increase this fund so as to make it far more than ample to take care of Mr. Harpole's claim, if and when it is allowed.

Mr. Harpole: The claim has already been allowed.

The Referee: I mean allowed to be paid out of this fund. In other words, if I should decide it should be paid out of this fund there will be sufficient to pay it from the sales noticed now.

Mr. Lynch: Yes, there will be enough in the fund next month because there will be another oil royalty check.

The Referee: In other words, you would not be prejudiced by the payment, Mr. Harpole?

Mr. Harpole: There would be no objection if there are [106] sufficient funds to pay both but I am not willing to stipulate that the State be paid and the Federal Government not paid.

Mr. Shelton: But of course the bank in its stipulation the tax be paid out of this fund, that would be subject to the agreement we have had all the time, that it would not be prejudicial in the position we have taken in the way of calling due on the sixty-day notice to foreclose.

Mr. Lynch: That is correct. We would have to pay it some time anyway and it would be better to pay it now and avoid the penalty.

The Referee: Any further questions?

Mr. Shelton: Mr. Gribble did not answer your question as to the amount of oil royalty paid the bank.

(Testimony of J. B. Gribble)

Mr. Lynch: I withdrew it. It is just a matter of computation.

The Referee: Do you have the total amount the oil wells have produced?

A. I have it at the office. I figured that for Mr. Carrey yesterday.

Mr. A. A. Carrey: Yes, I have that with me, the total of all oil wells from the beginning.

Mr. Cahill: I would like to call Mr. Carrey as a witness in the next proceeding.

Mr. Shelton: Q. Will you prepare for me so I can have it the first thing tomorrow morning a schedule showing how much [107] moneys have been released by the Security Bank to the Trustee in Bankruptcy for the payment of general expenses?

The Referee: You mean released from the sale of property and income from property on which the bank has security?

Mr. Shelton: On the secured lien and the oil account.

A. That would be the twenty per cent item and the rentals?

Mr. Shelton: Rentals up to the time we withdrew it, and whatever sum was allowed at the time of the Long Beach Harbor settlement, a very substantial sum of money was allowed then to the Trustee for the purpose of compensating attorneys and others at the time you gave the contract, waiving further payment.

Mr. Lynch: Oh no, no, Mr. Shelton. That has reference to the Bailie, Turner and Lake agreement. That occurred at the time of the condemnation proceedings.

Mr. Shelton: Yes, the condemnation proceedings. Well, I want the amount released, however. There was quite a substantial sum released out of the impounded

(Testimony of J. B. Gribble)

funds subject to the contract with Long Beach that came out of the oil. A. Yes, that is true.

Mr. Lynch: Yes, there was some released.

Mr. Shelton: I don't think it will be difficult to get that, will it, Mr. Gribble?

A. I don't believe so, Mr. Shelton. [108]

Q. And if you will have that for us tomorrow?

A. That is the twenty per cent on real property sales, the rentals, the Long Beach Harbor attorney items, the oil payments and the release on forty acres and the attorney fees?

Mr. Shelton: Yes.

The Referee: Any further questions of this witness? If not, you are excused, and you may call your next witness if you have one.

Mr. Cahill: We have nothing further.

The Referee: Do you have any further evidence, Mr. Harpole?

Mr. Harpole: We rest.

The Referee: Do you rest, Mr. Shelton?

Mr. Shelton: Yes.

The Referee: And you, Mr. Lynch?

Mr. Lynch: Yes.

The Referee: Do you wish to argue this matter now or wait until we have the other matters settled?

Mr. Shelton: We have all pretty well agreed this matter should be argued on briefs.

The Referee: There may be some questions I would like to ask counsel.

Mr. Shelton: In a number of cases I have found that it has been very enlightening to submit the briefs and then call it up for oral argument. [109]

The Referee: That might be a good idea.

Mr. Shelton: I would be glad to do that.

Mr. Lynch: That will be agreeable with us.

Mr. Shelton: Is that satisfactory, Mr. Harpole?

Mr. Harpole: Yes. I am prepared to file a brief now.

The Referee: You may file your opening brief.

Mr. Harpole: Yes.

The Referee: And how much time will you need, Mr. Shelton?

Mr. Shelton: I am going to be tied up in these other matters and then with a trial brief on this question—

The Referee: Why, as far as your brief is concerned, why couldn't your brief cover all matters?

Mr. Shelton: I do not see any reason why it could not.

The Referee: I will give you ten days.

Mr. Shelton: Thanksgiving intervenes and I do not believe that will be quite long enough to prepare this brief for all purposes, I mean on all issues here.

The Referee: How much time would you need?

Mr. Shelton: I would like to have fifteen to twenty days to put that in and I will say this, that I won't take all that time if it is not necessary. I will get it in as quickly as I can.

The Referee: Twenty days. How much time will you need to reply?

Mr. Harpole: I would like to put it off to some time [110] after Christmas. I am pretty well signed up until after that time.

The Referee: As long as the briefs in the matter can come in say by the first of the year.

Mr. Shelton: I would think so.

Mr. Lynch: The Trustee, I assume should have the same time Mr. Shelton has to reply to the Government brief if it is disposed to file any brief on that matter?

The Referee: Very well.

Mr. Shelton: As to the other matter, if we get to it after Mr. Harpole is out of the case I was going to suggest that my theory on that is that the contract itself is an estoppel to these people and casts certainly the burden of proof on them. If they are asking the Court to break it the burden of proof is on them and therefore they probably should open and let me follow. Then I can give a reply brief both to them and Mr. Harpole and in that way segregate the direct response to Mr. Harpole as well as replying to them, because they certainly interlock.

Mr. Harpole: I would like, if convenient, to have the mortgage foreclosure brief and the tax situation brief separate, or if they are in the same document to have them so segregated that I do not have to read too much to find it.

The Referee: I think he can cover your item under one heading or subject matter of his brief and it will be [111] easily found.

Mr. Lynch: If you are going to do that why not file separate briefs? As far as the Trustee is concerned we might prefer to have that done. I don't know whether we will file any brief in the other matter.

Mr. Harpole: I would prefer it that way. The briefs have to be distributed.

Mr. Shelton: Well, it means this, that we have to write two briefs at the same time.

Mr. Lynch: But you have to separate your brief anyway.

Mr. Shelton: Yes, but it is a whole lot easier the other way.

The Referee: If you want to answer Mr. Harpole and you want to adopt that as part of your brief in this matter you may do that.

Mr. Shelton: I may do that. I am sure you will be quite fascinated with the entire brief.

The Referee: Mr. Harpole, I was just wondering on these other questions if you are not an interested party in those, too, since one of the petitions here is Mr. Shelton petitioning the Court to turn this fund over to the bank and the other one is on his right to foreclose. Now, if the Court granted him the right to foreclose the question might enter in on the Government's right not only as to these taxes but other taxes.

Mr. Harpole: The other taxes, if there are other taxes, [112] are still in the offing, as far as I am concerned. The trusteeship is doing so well it would be reasonable to think they have earned more income taxes.

The Referee: I am afraid that will be the case.

Mr. Shelton: It is a fair inference.

The Referee: So I am just wondering if you are not an interested party in these other proceedings. You certainly are on the request to turn the fund over to him.

Mr. Harpole: I think the Trustee probably will protect the Government.

Mr. Lynch: Oh no.

Mr. Shelton: Now he wants to ride on their coat-tail.

Mr. Lynch: The Government will have to fight their own battle.

The Referee: I think on your petition and the one of Mr. Shelton to turn the money over to the bank you are asking it be turned over to you and he is asking that it be turned over to the bank, and I think they kind of interlock.

Mr. Lynch: The Trustee's position is it is up to them to determine it. It is their battle to determine who is going to get it. The Trustee will pay it in accordance with the Court's direction.

The Referee: Let us proceed. If you wish to enter your appearance you may, Mr. Harpole.

Mr. Harpole: I wish to have nothing to do with the fight between the Trustee and the mortgagee. I do not ask [113] for a ride with Mr. Lynch.

The Referee: Are you interested in whether or not the Court grants Mr. Shelton's motion to turn over this fund to the Bank?

Mr. Harpole: I am just interested in an order directing that the payment of administration expenses, particularly that the Federal income tax be paid.

Mr. Lynch: Well now, Mr. Harpole—

Mr. Harpole: And that is not inconsistent, as I see it. Mr. Shelton, as far as I know is entitled to foreclose his mortgage after—

The Referee: But you are overlooking one point. He is asking to foreclose this mortgage but he is asking for more than that. He is asking in a separate petition that the Court turn this money over that we have been talking about here to the bank. Now, you are contending in your petition that the Government should have that money or enough of it to pay your claim.

Mr. Harpole: That is right.

The Referee: If the Court should make an order directing that money be paid to the bank aren't you interested in that matter?

Mr. Harpole: If you make that order I think it would result in the Government wanting to protect itself and it would have to take a review of the order rendered, on its own petition. [114]

The Referee: Well, of course it is up to you as to whether or not you wish to appear in it, but I was just mentioning it so that in the event you did—

Mr. Shelton: It was on that theory I suggested we try them all together.

Mr. Lynch: One thing, as far as the Trustee is concerned we want to be sure of, and that is that the Government petition be determined prior to the time that the bank is allowed to foreclose, if it is allowed to foreclose. In other words, the Trustee does not want to find himself in the position that the Court should make an order granting the bank leave to foreclose without first determining this tax question.

The Referee: I think we will next proceed on Mr. Shelton's or the bank's petition directing or seeking an order of the Court directing the Trustee to pay this money over to the bank.

Mr. Shelton: Is Mr. Harpole going to sit in on this proceeding? If he is not I would like to know it. He has served me now with an opening brief, as of today. I would like to know how much time I will have.

The Referee: Mr. Shelton, I have never had any iron-clad rule about briefs coming in. If attorneys are late I usually call them up and tell them to get them in.

Mr. Shelton: I know Mr. Harpole is very kind about that and so is the Court. If the Court makes the order [115] within twenty days I will try to comply with it.

The Referee: I will make the order of twenty days and I will ask Mr. Harpole to try and reply in the next ten days, and that would apply to the Trustee also.

Mr. Harpole: I think that would be rather conflicting with engagements I have already.

The Referee: If you need additional time let me know and I will probably grant it.

Mr. Cahill: Might I indicate something to your Honor. I am very anxious to place before your Honor this day rather than another day in this week the testimony of certain experts I have here.

The Referee: I think we can get to them. I do not think there is much additional to go in on Mr. Shelton's motion.

Mr. Shelton: I don't think so either.

The Referee: Is it stipulated, gentlemen, that these same facts offered in the proceeding of the United States Government versus the Trustee may be considered in determining whether or not the Court should turn over this fund to the bank or direct the Trustee to turn this fund over to the bank?

Mr. Shelton: I should like that stipulation widened so it goes both as to the order to turn over and the order to foreclose.

Mr. Cahill: Oh, no, I cannot agree to that. [116]

Mr. Shelton: It is the same evidence.

The Referee: Let us take one at a time then.

Mr. Cahill: I have no objection, your Honor please, as to the turnover. As to the foreclosure I must object strenuously. For one thing, I have stood by and not participated in this proceeding at all.

The Referee: I think that is true, Mr. Cahill. Who is interested in the turning of this money over to the bank other than the Trustee? Any persons appearing on that matter?

Mr. Shelton: The Trustee just stated he was not interested in turning over that money we are asking to have turned over at this time.

Mr. Lynch: Certainly we are interested in the determination of who should get it. We have it and we want to know who to pay it to.

The Referee: Are you resisting the motion?

Mr. Lynch: Yes, I am resisting the bank's application on the ground the Government claims it, and I am resisting the bank's application on the ground the bank contends they are entitled to it.

Mr. Shelton: That is the only ground for opposition then?

Mr. Lynch: That is right. I am talking now about the fund that we have presently on hand from this oil.

The Referee: There has been some mention here of paying [117] the Trustee's fees and so forth. Are you resisting the bank's motion on the ground that any other expenses should be paid out of the fund?

Mr. Lynch: Well, yes. They have called attention to the fact I already stated in the answer that the Government is entitled to be paid out of the funds, and also that other administration expenses are entitled to be paid out of the same fund so that the Government would get a proration and not the whole fund as against other administration expenses. I am opposing it, of course, to that effect.

The Referee: Do you stipulate with Mr. Shelton that the evidence heretofore offered in the first proceeding, that is to say, the proceeding of the United States versus the Trustee, be received in evidence on the bank's petition to have the money turned over to the bank?

Mr. Lynch: I do.

Mr. Shelton: Subject to the objections that have been made, and the rulings of the Court.

The Referee: Yes, subject to objections and rulings that have been made.

Mr. Lynch: That is right.

Mr. Shelton: And the Court accepts that stipulation?

The Referee: Yes.

Mr. Shelton: I hold in my hand here for use in this proceeding a partial stipulation of facts worked out by Mr. Burch and Mr. Lynch which stipulates to the substantive facts— [118]

Mr. Cahill: Just a minute. Are we proceeding with the petition to foreclose?

Mr. Shelton: I thought the Court said we would stay with the other until we are through.

The Referee: Yes.

Mr. Cahill: Thank you.

Mr. Shelton: So at this time we offer in evidence this written stipulation of facts signed by attorneys for the bank and the attorneys for the Trustee.

The Referee: It may be received in evidence. I guess this probably should be marked as Bank's Exhibit number 1 in this proceeding, or that might be confusing. The bank has four exhibits in the other matter. I will mark this as Bank's Exhibit number 5 in this proceeding.

Mr. Shelton: Yes, your Honor.

Mr. Lynch: Mr. Harpole, are you going to participate in this proceeding? I have to step out for a moment.

Mr. Harpole: No, I have no desire to participate. I named the bank in the petition I filed. I responded, and I think that is enough to try the issues between the Government and the bank.

The Referee: Very well.

Mr. Harpole: If there is a separate battle between the Trustee and the bank I will keep out of that.

The Referee: Mr. Olson, correct my record. This is a stipulation and not an exhibit. So the stipulation will [119] just be filed and will not be marked as an exhibit at all. Now, do you have any further evidence?

Mr. Shelton: Just a moment, your Honor. We offer in evidence at this time a copy of a letter from Bailie,

Turner and Lake waiving its right to participate in certain fees upon the receipt of certain other fees that have heretofore been paid.

The Referee: This will be marked as Bank's Exhibit number 5.

Mr. Shelton: Mr. Lynch, I think that as to the item of advances made to the Trustee on Trustee's fees and so forth, some \$17,000, that we ought to have a stipulation in this particular proceeding that that matter, or the determination as to the bank's right to recover on that matter under its security should be postponed to at least the foreclosure suit if and when filed.

Mr. Lynch: Yes. I do not see that would be material at all at this time, particularly in this proceeding, because whatever money there is involved in here is not sufficient to pay the admitted liabilities to the bank.

Mr. Shelton: That is right.

Mr. Lynch: So I am perfectly willing to stipulate without prejudice to anybody that that be deferred.

Mr. Shelton: That will be satisfactory here. There is no use to go into those ramifications.

The Referee: Very well. [120]

Mr. Shelton: The testimony that was offered heretofore, the testimony of W. C. Shelton and the testimony that was offered by Mr. Adams and excluded will be also tendered in this proceeding, and the same rulings made?

The Referee: Yes. Counsel, I would like to have in evidence in this proceeding, that you have asked Mr. Gribble to secure for you, the total amount of funds which has come into the general account of the Trustee and been expended for administration expenses generally from funds derived from the sale of oil, rentals and so

forth of property on which the bank has security, I would like for that evidence when accumulated to be presented in this particular proceeding.

Mr. Shelton: Yes, I think that should be before your Honor.

Mr. Lynch: I think so, too, and with the Court's permission may I excuse Mr. Gribble now so he can work on that and we will have it in the morning.

Mr. Shelton: I know as far as I am concerned personally a statement that Mr. Gribble will get up, subject to approval by myself and Mr. Lynch, even after the other evidence is in, will be satisfactory.

The Referee: In other words, after he gets the statement made up you can offer that on stipulation?

Mr. Shelton: Yes.

The Referee: You won't need Mr. Gribble on the [121] foreclosure matter?

Mr. Lynch: Yes, we may later.

The Referee: He will be subject to call then.

Mr. Cahill: We will want him.

Mr. Lynch: Will you want him this afternoon?

Mr. Cahill: No.

The Referee: Now, gentlemen, is there any additional evidence?

Mr. Shelton: I do not believe so at this time on this petition.

The Referee: Very well. Then you rest?

Mr. Shelton: I rest.

The Referee: Do you have any evidence to offer?

Mr. Lynch: No.

The Referee: Anyone else appearing in this matter? Very well, then, that matter will stand submitted. Now, we may proceed with the foreclosure proceedings.

Mr. Lynch: I want to point out at this time although it may be more appropriate in briefs, that regardless of the letter of Bailie, Turner and Lake concerning its right to look to the oil funds for the payment of any of its fees, that no such letter was ever written by the Trustee, and there are in addition to the Trustee's fees additional expenses and we have by reference introduced the orders allowing those various items of expense.

The Referee: Very well. Well, you may proceed on the [122] petition to foreclose. [123]

IN THE DISTRICT COURT OF THE UNITED
STATES

SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION.

Before Hon. Ernest R. Utley, Referee.

State of California, County of Los Angeles—ss.

I, C. N. Olson, official reporter of the above-entitled court, do hereby certify that the foregoing pages 1 to 123, both inclusive, comprise a full, true and correct transcript of the testimony offered or taken and all rulings, acts and statements of the Court; also all objections or exceptions of counsel, and all matters to which the same relate, made during the progress of said proceedings of November 23, 1943, in re: United States of America versus Trustee.

Dated this 3rd day of December, 1943.

C. N. OLSON,

Official Reporter.

[Endorsed]: Filed Mar. 22, 1945. [124]

In the District Court of the United States
Southern District of California

Central Division

No. 25308-M

In the Matter of

F. P. NEWPORT CORPORATION, LTD.,
a corporation,

Bankrupt.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER OF THE DISTRICT JUDGE
UPON REVIEW OF THE REFEREE'S ORDER
DATED JUNE 6, 1944, DIRECTING PAYMENT
OF 1938 AND 1939 FEDERAL INCOME TAXES

The above entitled matter came on for hearing before the Court on November 27, 1944, upon the petition of the Security-First National Bank of Los Angeles for review of the Referee's Order of June 6, 1944, which directed the Trustee in Bankruptcy to pay the 1938 and 1939 income taxes due the United States, the Honorable Paul J. McCormick, Judge, presiding. The petitioner, Security-First National Bank of Los Angeles appeared by W. C. Shelton, its attorney; the Trustee in Bankruptcy appeared by Allen T. Lynch, his attorney; the respondent, United States of America, appeared by Charles H. Carr, United States Attorney; E. H. Mitchell and George M. Bryant, Assistant United States attorneys, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, its attorneys. After considering the arguments of counsel and the briefs presented, the Court now makes the following:

Findings of fact

I.

That on or about March 1, 1930, F. P. Newport Corporation, Ltd., a corporation, the bankrupt herein, borrowed from Security-First National [229] Bank of Los Angeles the sum of \$760,000.00, which is the same debt as that mentioned in the contract of January 12, 1937, more particularly hereinafter mentioned, including accretions thereto by way of accumulation of interest, additional borrowings, advances for taxes and for trustee's fees and expenses of the said Bank.

II.

That on or about March 1, 1930, F. P. Newport Corporation, Ltd., a corporation, conveyed to the Security-First National Bank of Los Angeles title to certain real property by four different grant deeds, the same being recorded in Book 9902, page 28, Book 9868, page 150, Book 9850, page 181, and Book 9838, page 216, respectively, of Official Records of Los Angeles County, California. That concurrently with the execution of said grant deeds to said Bank, the said Bank executed and delivered to F. P. Newport Corporation, Ltd. its certain written declaration of trust, under date of March 1, 1930, now known and referred to as Trust D 7224, formerly known and numbered Trust SS 70401, by the terms of which it acknowledged that it had received a conveyance of said property as trustee, with power of sale, as security for the payment of said loan of \$760,000.00 made by said Bank to said F. P. Newport Corporation, Ltd., and as security for all advances, costs, trustee's fees, and expense advanced and incurred under the terms of said declaration of trust.

III.

That thereafter F. P. Newport Corporation, Ltd. by three different grant deeds, conveyed to said Bank title to certain additional real property, under and pursuant to the terms of said declaration of trust, and as additional security for the payment of said indebtedness, said deeds being recorded in Book 11510, page 239, Book 11493, page 271, and Book 9929, page 62, respectively, of Official Records of Los Angeles County, California.

IV.

That the properties so transferred to said Bank and record title to which is now held by it pursuant to the terms of said declaration [230] of trust, consist largely of real property, some of which is located in what is known as "Verdugo Woodlands" and some in the San Fernando Valley, and some in the Wilmington Harbor area. That the Verdugo Woodlands property consists partly of subdivided lots and partly of unsubdivided acreage; that the San Fernando Valley property consists of approximately 154 acres; that the Wilmington Harbor property consists of a number of subdivided lots, nine acres of which is on what is known as Channel No. 3 of the Long Beach Harbor, and approximately 20 acres of unsubdivided property in said harbor area.

V.

That on or about March 1, 1930, F. P. Newport Corporation, Ltd., as further and collateral security for the aforementioned indebtedness, by written assignment, pledged to the Security-First National Bank of Los Angles the entire beneficial interest in and to said Trust No. #D7224. That on May 16, 1933, the said bankrupt corporation, F. P. Newport Corporation, Ltd., and F. P. Newport and Letitia J. Newport, his wife, granted

to said Security-First National Bank of Los Angeles as trustees all of their right, title and interest in and to the real property situated on Channel No. 3, in the Long Beach Harbor area, containing nine acres more or less, the said grant deed being recorded in Book 1226, page 21 of Official Records of Los Angeles County. That said property so conveyed had previously been conveyed to the said Bank as such trustee on March 20, 1930, and said deed of May 16, 1933, confirmed and ratified said prior conveyance to said Bank. That the legal title to said nine acre parcel of land was then vested in Title Guarantee & Trust Co., as trustees. That subsequently to the said above mentioned conveyance and prior to the execution of the oil lease hereinafter referred to, the said Bank at the request of H. F. Metcalf, Trustee in Bankruptcy, and upon the order of the above entitled Bankruptcy Court, did advance a large sum of money to compromise the claims of various persons in and to said nine acre tract of land. That upon said adverse claims being so satisfied and discharged the legal title to said nine acre tract was conveyed to Security-First National Bank of Los [231] Angeles by said Title Guarantee & Trust Co. to be held by said Bank subject to the terms and conditions of said declaration of trust D 7224, and the contract of January 12, 1937, as supplemented, modified and amended. That under the order of the said Bankruptcy Court, said advance was added to and became a part of the indebtedness owing to said Bank by said Bankrupt.

VI.

That the said declaration of trust No. D 7224 provides, among other things, as follows:

“Article Sixteenth: All proceeds and avails arising from the rents, issues, leases and sales of the

Trust property, or otherwise, shall be paid to and received by the said Trustee, and said Trustee shall disburse all such proceeds and avails as follows:

* * * * *

"III. All proceeds and avails arising from the leases and rentals of said property so received by the said Trustee shall be credited to the General Fund.

* * * * *

"VII. Out of the moneys credited to the General Fund the Trustee shall pay.

1st: Its accrued costs, fees and expenses as hereinafter determined, unless they be sooner paid;

2nd: The taxes, assessments and installments of principal and interest on street bonds assessed or imposed on or against said property then due and unpaid, not payable by the purchaser thereof from the said Trustee.

Should the moneys in the hands of the Trustee available for that purpose be insufficient to pay said taxes and assessments, and installments of the principal and interest on the street bonds when due, then the Beneficiary by its ratification of this Declaration of Trust, covenants and agrees to immediately pay any deficiency in [232] the amount due on said taxes, assessments and bonds to the Trustee;

3rd: Any improvements upon the Trust property, upon the order of the Beneficiary hereunder, or its duly authorized Agent, and/or as contracted by the Trustee as provided for in Article Fourteenth hereof;

4th: Interest, as and when due, on any note secured hereby, if there are not sufficient moneys in the Interest Fund with which to pay the same;

5th: Any liens or incumbrances covering the property sold, nor payable by the purchaser thereof from the said Trustee;

6th: Principal upon any note secured hereby in favor of the Payee after the due date thereof; and

7th: Subject to the foregoing provisions, and provided the Beneficiary is not in default in any manner under the terms of this Declaration of Trust, all of the balance of the moneys received by the said Trustee shall be applied, disbursed and paid in convenient monthly installments to F. P. Newport Corporation, Ltd., a Delaware Corporation, the Beneficiary hereunder, its successors or assigns."

VII.

That the indebtedness secured by said Declaration of Trust and the collateral pledge of the beneficial interest therein being long past due, the said Security-First National Bank of Los Angeles, as trustee under said declaration of trust, did in accordance with the provisions of said declaration of trust declare the entire unpaid balance of the obligation to be due, and fixed the date for the sale of the real property, standing in the name of said Bank as said trustee, for March 29, 1935.

VIII.

That on March 19, 1935, an involuntary petition in bankruptcy was filed against the above named bankrupt. Thereafter, and on or about March 25, 1935, H. F. Metcalf was appointed Receiver in Bankruptcy of all the [233] property and assets of the above named Bankrupt Corporation, including the property record title to which was held by the said Security-First National Bank of Los Angeles as such trustee, and the above entitled Court duly restrained said Bank from proceeding with said foreclosure sale.

IX.

That on or about March 25, 1935, said H. F. Metcalf duly qualified as such Receiver and went into possession of the property and assets of said Bankrupt Corporation, including the real property conveyed to said Security-First National Bank of Los Angeles, as trustee, as hereinabove found.

X.

That from time to time thereafter, and prior to the 12th day of January, 1937, said Bank made application to the above entitled court for leave to foreclose and sell that certain real property record title to which was held by it under the said trust No. D 7224. That the Court, over the objection of said Security-First National Bank of Los Angeles, continued said restraining order in full force and effect.

XI.

That subsequent to the 25th day of March, 1935, and prior to the adjudication of said F. P. Newport Corporation, Ltd. as a Bankrupt, extensive negotiations and conferences were had by and between the Security-First National Bank of Los Angeles, the Receiver and their respective counsel, and other interested parties, looking to, and in an effort to devise a method for the liquidation of the properties record title to which was held by said Bank under its trust hereinabove mentioned, and to obviate the necessity of litigation between said Bank and said Bankrupt Estate. That following those conferences and negotiations, an agreement in writing, bearing date of January 12, 1937, was made and executed by and between the Bankrupt Corporation, the said Bank and the said Receiver, which agreement was subsequently supplemented and modified.

XII.

That the said agreement, together with a supplement thereto and [234] modifications thereof, was duly approved, ratified and confirmed by this Court, and the above entitled Court. That thereafter an appeal from the order so approving and ratifying said agreement, supplement thereto and modifications thereof, was taken to the United States Circuit Court of Appeals (Ninth Circuit) which Court affirmed the said order. That a petition for a writ of certiorari to review the said order was filed with the Supreme Court of the United States and said petition was denied.

XIII.

That thereafter, on January 12, 1937, said F. P. Newport Corporation, Ltd. was duly adjudicated a bankrupt.

XIV.

That under date of March 18, 1937, H. F. Metcalf was duly appointed Trustee of said bankrupt estate, duly qualified as such Trustee and ever since said date has been and now is in possession of the property and assets of the Bankrupt Corporation as such Trustee. That said agreement as supplemented and modified was duly signed by said H. F. Metcalf as Trustee in Bankruptcy under the order and direction of this Court.

XV.

That by the terms of said agreement as so supplemented and modified, it was stipulated, among other things, that the principal Amount of the indebtedness due to said Security-First National Bank of Los Angeles amounted to \$1,304,918.77, and should be payable in installments as therein provided, and that all indebtedness due said Bank should be paid on or before September 7,

1940. That the said agreement, as modified, among other things, provides:

"That while the said Declaration of Trust No. D 7224 and the contract of January 12, 1937, provide expressly that all moneys from sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring that all bankruptcy funds be accounted for by the Trustee and be disbursed by him only upon checks or warrants [235] countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D 7224 and the Agreement of January 12, 1937, as modified hereby.

"Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds or moneys so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust shall, until the indebtedness due the Bank has been paid and except as hereinafter provided, be, while in his possession impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this sup-

plement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate. No provision of said agreement of January 12, 1937, or this supplement thereto is made or entered into, directly or indirectly, for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorney of any party in interest in this bankruptcy proceeding, for services rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to any one whomsoever from the assets of this Bankrupt Estate, is, in accordance with the Law, left entirely to the determination of the court hav- [236] ing jurisdiction of this bankruptcy proceeding, unaffected by any provision, term or condition, express or implied, of said contract of January 12, 1937, or of this supplement thereto."

XVI.

That thereafter, and with the approval of this Court, said Trustee in Bankruptcy, and Security-First National Bank of Los Angeles as trustee under its said trust, and the Bankrupt, did on or about the 14th day of January, 1938, make and enter into a lease with the Universal Consolidated Oil Company, as Lessee, under and by the terms of which there was let to said Lessee a portion of the real property of said Bankrupt Estate, the title to which stands of record in the name of said Security-First National Bank of Los Angeles as trustee and as security for the obligation owing to said Bank, for the purpose of producing oil and gas from said property. Thereafter the Lessee discovered oil and gas on said property and has produced oil and gas therefrom in commercial paying quantities.

XVII.

That pursuant to said order of court approving said agreement, supplement and modifications, the oil and gas royalties received by said Trustee in Bankruptcy from Universal Consolidated Oil Company have been deposited in a special account carried in the name of the Trustee in Bankruptcy at the head office of Security-First National Bank of Los Angeles, Sixth and Spring Streets, Los Angeles, California. That oil and gas royalties including bonuses actually paid to the Trustee in Bankruptcy under the terms and provisions of said lease during the years 1938 and 1939 were paid to said Bank, with the consent of said Bank, by the Trustee in Bankruptcy on orders of this Court to cover taxes assessed against the properties record titles to which was held by said Bank as trustee under its said trust, cost of engineering services for checking oil and gas production on the property leased to said Universal Consolidated Oil Company, and to apply on account of interest and principal owing on the secured debt to said Bank. [237.]

XVIII.

That on July 22, 1940, Nat Rogan, as United States Collector of Internal Revenue for the Sixth Collection District of California, filed a claim in these proceedings on behalf of the United States of America in the amount of \$19,363.65 representing the amount of alleged deficiency in income tax determined by the Commissioner of Internal Revenue as owing by the Trustee in Bankruptcy and the bankrupt estate for the years 1938 and 1939. That objections to said claim were filed by the said Trustee in Bankruptcy and sustained by this Court. That, on appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed this Court and held that said H. F. Metcalf as such Trustee in Bankruptcy and said

bankrupt estate were indebted to the United States of America for federal income tax as set forth in said claim. That, pursuant to said judgment of said Circuit Court of Appeals, the Honorable Paul J. McCormick as Judge of the above entitled Court made and signed an order in these proceedings on April 8, 1943, allowing said claim in full with interest as provided by law. That said claim has not nor has any part thereof been paid.

XXIX.

That said Security-First National Bank of Los Angeles received during the years 1938 and 1939 a total of \$451,851.01 from oil and gas royalties paid to it by said Trustee in Bankruptcy of which \$97,665.88 was applied by said Bank on interest owing to it, \$59,010.43 on taxes assessed against the properties record title to which stands in the name of said Bank as trustee under its said trust, \$5,903.23 for expenses of cost of checking production of oil and gas, and the balance of \$289,271.47 on the principal of the secured indebtedness owing to said Bank.

XX.

That the Commissioner of Internal Revenue determined that the net income on which said tax was assessed was \$87,066.42 for the calendar year 1938 and \$30,288.99 for the calendar year 1939.

XXI.

That said Trustee in Bankruptcy has not now, nor has he at any [238] time had since the assessment of said tax, any funds with which to pay said tax unless oil and gas royalties paid to him under said lease with Universal Consolidated Oil Company can be used for the payment thereof. That said Security-First National Bank of Los Angeles claims and asserts that the whole of said oil and gas royalties must be paid to it without deduction.

XXII.

That said agreement of January 12, 1937, provides in part as follows:

"Disbursement of the Special Fund. Out of the Special fund, the Bank shall pay all taxes, assessments, insurance, interest and other charges and expenses of said Trust No. D 7224 not theretofore paid by the Trustee in Bankruptcy. After payment out of said Special Fund of all current interest, taxes, assessments and Trust Expense, and after first setting aside in said Special Fund a reserve sufficient to pay all interest, taxes, assessments and Trust Expenses for one additional year, the remainder of the money in said Special Account shall be paid over to the Trustee in Bankruptcy.

* * * * *

"All income from oil, in the nature of bonuses, rentals and royalties from any of the properties held by the Bank in Trust, so paid to the Bank, shall be placed by the Bank in a Special Oil Account.

"The funds in said Account shall be available to the Trustee in Bankruptcy for the purpose of making up any deficiency in the 'Special Fund,' to pay interest, taxes, assessments and expenses, as hereinabove provided, in order to obviate a default; provided, however, that all sums taken from said Oil Account for such purpose shall be repaid to said Oil Account from moneys thereafter coming into Special Fund and not needed to pay other or additional interest, taxes, assessments, or expenses then due. [239]

"Except as herein provided, all amounts in said accounts, shall be applied on September first and March first of each year, or on such other dates as shall be mutually agreed upon by the Trustee in Bank-

ruptcy and the Bank, on the principal of said indebtedness and shall be considered as cash applied on the quotas of principal as hereinbefore set forth."

XXIII.

That said Trustee in Bankruptcy now has on deposit in said special account carried in his name at said head office of Security-First National Bank of Los Angeles the proceeds of oil and gas royalties received by him from Universal Consolidated Oil Company amounting to approximately \$21,000.

XXIV.

That said Trustee in Bankruptcy now has on deposit in a special account carried in his name as said Trustee at the head office of Citizens National Trust & Savings Bank of Los Angeles, Fifth and Spring Streets, Los Angeles, funds representing surface rentals of \$1495.02 received from tenants of portions of the properties record title to which it held by Security-First National Bank of Los Angeles as trustee under its trust D 7224.

From the foregoing Findings of Fact, the Court reaches the following:

Conclusions of Law

I.

That the income tax for the calendar years 1938 and 1939 hereinbefore referred to was the result of the production of income the full benefit and enjoyment of which was had by Security-First National Bank of Los Angeles. [240]

II.

That the properties record title to which is held by said Bank under its trust D-7224 as security for the obligation owing to said Bank by the Bankrupt have been administered by said Trustee in Bankruptcy by and with the consent and approval of said Bank and for the benefit of said Bank.

III.

That the income taxes for the years 1938 and 1939 are incidental to said administration and a necessary part of the expense of operating, preserving, collecting and liquidating the properties and distributing the proceeds thereof.

IV.

That Security-First National Bank of Los Angeles, having had the full benefit of the income which resulted in the assessment of said taxes, should pay the taxes out of that income for said taxes are a necessary cost of producing said income.

V.

That by the provisions of said agreement of January 12, 1937, as supplemented and modified, the oil and gas royalties received from Universal Consolidated Oil Company can be used for the purposes of paying taxes including income taxes assessed against the Trustee in Bankruptcy and the bankrupt estate herein.

VI.

That said claim of United States of America and the Collector of Internal Revenue for said income taxes should be paid by the Trustee in Bankruptcy herein out of the special accounts of said Trustee in Bankruptcy with said Security-First National Bank of Los Angeles and with said Citizens National Trust & Savings Bank of Los Angeles, and if said funds now on deposit in said special accounts are insufficient to pay said taxes in full and interest thereon, such deficiency should be paid by the Trustee in Bankruptcy out of oil and gas royalties when and as received by him from Universal Consolidated Oil Company [241]

VII.

That since the funds now on deposit in said special accounts of said Trustee in Bankruptcy appear to be in-

sufficient to pay said income taxes in full and interest, it is not necessary for this Court at this time to determine whether oil and gas royalties paid to the Trustee in Bankruptcy herein under said oil and gas lease with Universal Consolidated Oil Company or surface rentals received by the Trustee in Bankruptcy from tenants of the property record title to which is held by said Bank as trustee under its said trust D-7224 may be used to pay expenses of administration other than said income taxes.

VIII.

That the Referee in Bankruptcy did not err in his Order of June 6, 1944.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the Order of the Referee in Bankruptcy, dated June 6, 1944, directing payment of the 1938 and 1939 income taxes due the United States be, and the same is hereby confirmed.

Dated, Feb. 6th. 1945.

PAUL J. McCORMICK
District Judge

Approved as to Form:

Attorneys for Security-First National Bank.

Judgment entered Feb. 6, 1945. Docketed Feb. 6, 1945. Book 30, page 632. Edmund L. Smith, Clerk; By B. B. Hansen, Deputy.

Notation made in Bankruptcy Docket on Feb. 6th, 1945, pursuant to Rule 79(a), Civil Rules of Procedure. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by B. B. Hansen, Deputy.

[Endorsed]: Filed Feb. 6, 1945. [242]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

Notice is hereby given, that the Security-First National Bank of Los Angeles, a national banking association, a secured creditor of the Bankrupt, and a claimant in the above bankruptcy proceedings, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the Order of the United States District Court for the Southern District of California, Central Division, entered February 6, 1945, in C O Book 30, page 632, confirming and approving the Order of Ernest R. Utley, Referee in Bankruptcy, of June 6, 1944, directing payment of 1938 and 1939 Federal Income Taxes out of rents, issues and profits hypothecated to said Security First National Bank of Los Angeles, as security for the payment of the indebtedness due it from said F. P. Newport Corporation, Ltd., a corporation, Bankrupt.

Dated: February 26th, 1945.

W. C. SHELTON &
GEORGE W. BURCH, JR.

By W. C. SHELTON

Attorneys for Security-First National Bank of Los Angeles, 923 Subway Terminal Building, 417 S. Hill Street, Los Angeles 13, California.

3-2-45 Mailed copy to Chas. H. Carr, U. S. Atty., and Bailey, Turner & Lake, Attys. for Trustee.

[Endorsed]: Filed Mar. 2, 1945. [248]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO BE
URGED UPON APPEAL.

1. That the District Court and the Referee in Bankruptcy erred in ordering H. F. Metcalf, Trustee in Bankruptcy for the above named Bankrupt, to pay to the Collector of Internal Revenue of the United States the Federal Income Tax assessed for the calendar years 1938 and 1939, and interest thereon, out of oil and gas royalties and surface rentals received or to be received by the said Trustee in Bankruptcy from properties, the record title to which stands in the name of the Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, for the reason that under and by virtue of that certain contract of January 12, 1937, as supplemented and modified, between the Security-First National Bank of Los Angeles, F. P. Newport Corporation, Ltd., a Bankrupt, and H. F. Metcalf, as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., a Bankrupt, the said oil and gas royalties and surface rentals received or to be received by the said Trustee in Bankruptcy were sequestered for the payment of the indebtedness of said Bankrupt corporation to the Security-First National Bank of Los Angeles, said debt being in excess of \$600,000.00 as of the date of said Referee's order; that [252] said sequestered funds were to be free of any recourse thereto by the Trustee in Bankruptcy for the payment of any costs and expenses incurred by him as such Trustee, and free and clear of any claims thereto by any creditor of said Trustee in Bankruptcy, including the Collector of Internal Revenue and the United States Government for income taxes, and free of any general creditor's claims in the Bankruptcy proceedings.

2. That the District Court and the Referee in Bankruptcy erred in ordering H. F. Metcalf, Trustee in Bankruptcy of the above named bankrupt, for the purpose of making said payment of income taxes for the calendar years 1938 and 1939, and interest thereon, to use any funds on deposit in the special accounts carried in his name as said Trustee in Bankruptcy at the Head office of the Security-First National Bank of Los Angeles, Sixth and Spring Streets, Los Angeles, California, and Citizens National Trust and Savings Bank, 5th and Spring Streets, Los Angeles, California, for the reason that under and by virtue of that certain contract of January 12, 1937, as supplemented and modified, said special accounts comprised and consisted only of the rents, issues and profits received or to be received by said Trustee in Bankruptcy from properties, the record title to which stood in the name of Security-First National Bank of Los Angeles as Trustee under its Trust D 7224, and which amounts were sequestered for the payment of the indebtedness due from F. P. Newport Corporation, Ltd. a Bankrupt, to the Security-First National Bank of Los Angeles.

3. That the District Court and the Referee in Bankruptcy erred in denying the Petition and Prayer of Security-First National Bank of Los Angeles that said Trustee in Bankruptcy be required to pay over to the said Bank the oil and gas royalties and surface rentals received, or to be received, by the said Trustee in Bankruptcy from the properties the record title to which stands in the name of said Bank as Trustee under its Trust D 7224, for the reason that under and by virtue of said contract of January 12, 1937, as [253] supplemented and modified, the said oil and gas royalties and surface rentals received or to be received by said Trustee in Bankruptcy

from said properties were sequestered for the payment of the indebtedness due from said Bankrupt to the Security-First National Bank of Los Angeles.

4. That the Referee in Bankruptcy erred in holding that as to the Security-First National Bank of Los Angeles, the said Trustee in Bankruptcy was, during the calendar years of 1938 and 1939, operating property of said Bankrupt, the record title to which is held by the Security-First National Bank of Los Angeles, within the meaning of Section 52 (a) of the Revenue Code, and Section 19.52-2 of Treasury Regulations 103, since the said Trustee in Bankruptcy's operation thereof was for liquidation purposes and as limited by said contract of January 12, 1937, as supplemented and modified.

5. That the District Court and the Referee in Bankruptcy erred in holding that the net income received by said Trustee in Bankruptcy during the calendar years 1938 and 1939, respectively, from properties, the record title to which is held by Security-First National Bank of Los Angeles under its Trust D 7224, under and by virtue of said contract of January 12, 1937, as supplemented and modified, was subject to Federal Income tax within the meaning of Section 52 (a) of the Revenue Act of 1938, and of the Internal Revenue Code, for the reason that under the provisions of said contract, as supplemented and modified, the said net income was sequestered for the payment of indebtedness owed by the Bankrupt corporation to the Security-First National Bank of Los Angeles.

6. That the District Court and the Referee in Bankruptcy erred in holding that the properties, the record title to which is held by the Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, and as security for the obligation owed by the Bankrupt cor-

poration to said Bank, have been administered by said Trustee in Bankruptcy by and with the consent and approval of said Bank, and for the benefit of said bank, for the reason that said [254] Trustee in Bankruptcy's possession of said properties are for liquidation purposes only, as provided by the said contract of January 12, 1937, as supplemented and modified.

7. That the District Court and the Referee in Bankruptcy erred in holding that the income tax for the calendar years 1938 and 1939 was the result of the production of income, the full benefit and enjoyment of which was held by the Security-First National Bank of Los Angeles, for the reason that the income tax was levied against the said Trustee in Bankruptcy and not against the said Security-First National Bank of Los Angeles, and for the further reason that said income tax, by virtue of said contract of January 12, 1937, as supplemented and modified, cannot be charged against oil and gas royalties and surface rentals received or to be received from properties, the record title to which is held by the said Bank.

8. That the District Court and the Referee in Bankruptcy erred in holding that the properties the record title to which is held by said Bank under its Trust D-7224, as security for the obligation owing to said Bank by the Bankrupt have been administered by said Trustee in Bankruptcy by and with the consent and approval of said Bank and for the benefit of said Bank.

9. That the District Court and the Referee in Bankruptcy erred in holding that the income taxes for the years 1938 and 1939 are incidental to said Bankruptcy administration, and a necessary part of the expense of operating, pursuing, collecting and liquidating the prop-

erties and distributing the proceeds thereof, in so far as said Security-First National Bank of Los Angeles is concerned, for the reason that under the provisions of said contract of January 12, 1937, as supplemented and modified, all of the oil and gas royalties and surface rentals received and to be received by said Trustee in Bankruptcy, which includes all sums in the special bank accounts standing in the name of the Trustee in Bankruptcy, from properties the record title to which is held by the Security-First National Bank of Los Angeles, were sequestered for the payment of the indebtedness owed by said Bankrupt to said Bank. [255]

10. That the District Court and the Referee in Bankruptcy erred in holding that Security-First National Bank of Los Angeles, having the full benefit of the income which resulted in the assessment of said taxes, should pay the taxes out of that income, for the reason that the tax assessed for the years 1938 and 1939 were assessed against the said Trustee in Bankruptcy and for his operations and not against said Security-First National Bank of Los Angeles.

11. That the District Court and the Referee in Bankruptcy erred in holding that by the provisions of said agreement of January 12, 1937, as supplemented and modified, the oil and gas royalties received from Universal Consolidated Oil Company, lessee of property, the title to which stands in the name of Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, can be used for the payment of income taxes assessed against the Trustee in Bankruptcy and the Bankrupt Estate, for the reason that said contract, as supplemented and modified, provides that such income is sequestered for the benefit of the Security-First National Bank of Los

Angeles, to be applied by said Bank on the indebtedness due it from said Bankrupt Corporation.

12. That the District Court and the Referee in Bankruptcy erred in holding that if the funds on deposit in said special bank accounts, which comprises the income collected from properties the record title to which stands in the name of the Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, are insufficient to pay said claim of the United States of America and the Collector of Internal Revenue for income taxes for the calendar years 1938 and 1939, plus interest thereon, such deficiency should be paid by the Trustee in Bankruptcy out of oil and gas royalties when and as received by him from Universal Consolidated Oil Company, for the reason that such rents, issues and profits, by virtue of the provisions of said contract of January 12, 1937, as supplemented and modified, were sequestered for the payment of the indebtedness due said Bank by said Bankrupt corporation.

Dated: March 9, 1945.

W. C. SHELTON &
GEORGE W. BURCH, JR.
By W. C. SHELTON
Attorneys for Appellant [256]

Received copy of the within Appellant's Statement of Points to be Urged on Appeal this 9th day of March, 1945.

BAILIE, TURNER & LAKE
By F. C. GRANT
Attorneys for Trustee in Bankruptcy
EUGENE HARPOLE
By BEATRICE HOBAN
Attorney for Collector of Internal Revenue
[Endorsed]: Filed Mar. 9, 1945. [257]

[Title of District Court and Cause.]

NOTICE OF MOTION.

To the United States of America, and its attorneys, Charles H. Carr, United States Attorney; E. H. Mitchell, and George M. Bryant, Assistant United States Attorneys, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, its attorneys, and H. F. Metcalf, Trustee in Bankruptcy, and Allen T. Lynch, his attorney:

You and each of you will please take notice, that the Security-First National Bank of Los Angeles, a secured creditor of the above named bankrupt, will, on the 26th day of February, 1945, at the hour of two o'clock P. M., or as soon thereafter as counsel can be heard, in the Court Room of Honorable Paul J. McCormick, make a motion to have the Court fix the supersedeas bond on appeal of the Security-First National Bank of Los Angeles to the Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Southern District of California, Central Division, entered February 6, 1945, in C O Book 30, page 632, confirming and approving the Order of Ernest R. Utley, Referee in Bankruptcy, of June 6, 1944, directing payment of 1938 and 1939 Federal Income Taxes out of rents, issues and profits hypothecated [243] to Security-First National Bank of Los Angeles as Security for the payment of the indebtedness due it from said F. P. Newport Corporation, Ltd.

In connection with said Motion, you and each of you will be advised that said Bank will move said court for

an Order directing the Trustee in Bankruptcy to hold the amount of money required to pay the Federal Income Taxes for the calendar years of 1938 and 1939 plus interest and costs, in a special account, separate from other funds of said Trustee, pending the determination of the appeal and the fixing of the supersedeas bond in a nominal amount.

Said Motion will be based on this Notice of Motion, and the records and files of the above Bankruptcy.

Dated: February 16, 1945.

W. C. SHELTON &
GEORGE W. BURCH, JR.

By W. C. SHELTON

Attorneys for Security-First National Bank of Los Angeles [244]

Received copy of within Notice of Motion and copy of Points and Authorities this 16th day of February, 1945.

CHARLES H. CARR E.H.

United States Attorney

E. H. MITCHELL and E.H.

GEORGE M. BRYANT E.H.

EUGENE HARPOLE

Special Attorney, Bureau of Internal Revenue

ALLEN T. LYNCH

Attorney for H. F. Metcalf Trustee

[Endorsed]: Filed Feb. 16, 1945. [245]

[Title of District Court and Cause.]

ORDER FIXING SUPERSEDEAS BOND ON
APPEAL

The motion of the Security-First National Bank of Los Angeles to fix the supersedeas bond on appeal of the Security-First National Bank of Los Angeles to the Circuit Court of Appeals for the Ninth Circuit *Court of Appeals* from the Order of the District Court of the United States, for the Southern District of California, Central Division, confirming and approving the Order of Ernest R. Utley, Referee in Bankruptcy, of June 6, 1944, duly came on for hearing on February 26, 1945, at 2:00 P. M. in Court Room No. 8 of the above entitled court, before Honorable Paul J. McCormick, Judge presiding; the Security-First National Bank of Los Angeles being represented by attorneys W. C. Shelton and George W. Burch, Jr., the United States of America being represented by attorney Eugene Harpole, and H. F. Metcalf, Trustee in Bankruptcy, being represented by his attorney, Allen T. Lynch.

Good Cause having been shown in the premises, and it appearing to the Court that Security-First National Bank of Los Angeles, a national banking association, is appealing to the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing [246] to the Court that appellant is entitled to such a stay,

It Is Ordered, that H. F. Metcalf, as Trustee in Bankruptcy, is instructed to hold \$25,000.00 in his special oil

account pending the further order of the court, and that execution of any proceeding to enforce the Order entered herein on the 6th day of February, 1945, confirming the Order of Referee on Review, be stayed pending the determination of the appeal of the Security-First National Bank of Los Angeles from such Order, upon the filing by said Security-First National Bank of Los Angeles, and approval by this Court, of a bond in the sum of \$1,750.00.

Dated: March 2nd, 1945.

PAUL J. McCORMICK,

Judge of the United States District Court, Southern District of California, Central Division.

Approved as to Form:

CHARLES H. CARR,

United States Attorney

E. H. MITCHELL and GEORGE M. BRYANT,

Assistant United States Attorneys, and

EUGENE HARPOLE,

Special Attorney, Bureau of Internal Revenue

By EUGENE HARPOLE

Attorneys for United States of America

BAILIE, TURNER AND LAKE,

By ALLEN T. LYNCH

Attorneys for H. F. Metcalf, Trustee in

Bankruptcy

W. C. SHELTON and

GEORGE W. BURCH, JR.,

By W. C. SHELTON

Attorneys for Security-First National Bank

of Los Angeles.

Dated: February 27, 1945.

[Endorsed] : Filed Mar. 2, 1945. [247]

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL OF SECURITY-FIRST NATIONAL BANK OF LOS ANGELES.

Know All Men by These Presents, That we, Security-First National Bank of Los Angeles, a National Banking Association, as Principal, and Indemnity Insurance Company of North America, a Pennsylvania corporation having its principal office in Philadelphia, Pennsylvania, as Surety, are held and firmly bound unto the United States of America in the full and just sum of One Thousand Seven Hundred Fifty and no/100 Dollars (\$1750.00), to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Whereas, an order of Hon. Paul J. McCormick, Judge of the District Court of the United States, Southern District of California, Central Division, was entered on the 6th day of February, 1945, in the matter of F. P. Newport Corporation, Ltd., Bankrupt, Action No. 25308-M, confirming and approving the order of June 6, 1944 of Ernest R. Utley, Referee in Bankruptcy of said Court, and Security-First National Bank of Los Angeles, a secured creditor of said F. P. Newport Corporation, Ltd., has filed a notice of appeal to the Circuit [249] Court of Appeals for the Ninth Circuit *Court of Appeals from* said order entered on the 6th day of February, 1945.

And Whereas, it has been further ordered by Hon. Paul J. McCormick, Judge of the said District Court of the United States, that execution of any proceedings to enforce the order entered on the 6th day of February, 1945, confirming and approving the order of June 6,

1944 of Ernest R. Utley, Referee in Bankruptcy, be stayed pending the determination of the appeal of said Security-First National Bank of Los Angeles from such order, upon the filing by said Security-First National Bank of Los Angeles and approval by the Court of a bond in the sum of One Thousand Seven Hundred Fifty and no/100 Dollars (\$1750.00),

Now, Therefore, the condition of this obligation is such that if the said Security-First National Bank of Los Angeles, a National Banking Association, shall prosecute its appeal to effect, and if for any reason the appeal is dismissed, or the order appealed from is affirmed or modified, shall pay all costs and damages for delay, if any, as the said Circuit Court of Appeals for the Ninth Circuit *Court of Appeals* may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 1st day of March, 1945.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

By R. T. ADAMS

Asst. Vice Pres.

INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA

By C. F. BATCHELDER

(Seal)

Attorney in Fact [251]

State of California,

County of Los Angeles—ss.

On this 1 day of March in the year one thousand nine hundred and forty-five, before me F. D. Lanctot, a Notary Public in and for the County of Los Angeles, personally appeared C. F. Batchelder known to me to be the person whose name is subscribed to the within instrument as the

Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name as Attorney-in-fact.

(Seal)

F. D. LANCTOT

Notary Public in and for the County of Los Angeles, State of California.

My commission expires August 24, 1947. [250]

The foregoing bond is hereby approved as to form:

CHARLES H. CARR,

United States Attorney,

E. H. MITCHELL and

GEORGE M. BRYANT,

Assistant United States Attorneys, and
EUGENE HARPOLE,

Special Attorney, Bureau of Internal Revenue
By EUGENE HARPOLE

Attorneys for United States of America
BAILIE, TURNER AND LAKE

By ALLEN T. LYNCH

Attorneys for H. F. Metcalf, Trustee in
Bankruptcy.

W. C. SHELTON and

GEORGE W. BURCH,

By W. C. SHELTON,

Attorneys for Security-First National Bank of
Los Angeles

I hereby approve the foregoing bond this 2nd day of March, 1945.

PAUL J. McCORMICK

Judge of the United States District Court

[Endorsed: Filed Mar. 2, 1945. [251]]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the attorneys for the United States of America, claimant-appellee, the attorneys for the Security-First National Bank of Los Angeles, appellant, and the attorneys for H. F. Metcalf, Trustee in Bankruptcy for the above named Bankrupt, that subject to the approval of the Court, the time within which to file the record and docket the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 11th day of May, 1945.

Dated: This 5th day of April, 1945.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Asst. United States Attorney

GEORGE M. BRYANT

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney Bureau of

Internal Revenue

By Eugene Harpole

Attorneys for Claimant-Appellee

BAILIE, TURNER & LAKE

By Norman A. Bailie

Attorneys for H. F. Metcalf, Trustee in
Bankruptcy [262]

W. C. SHELTON and

GEORGE W. BURCH, JR.

By W. C. Shelton

Attorneys for Appellant Security-First
National Bank of Los Angeles

It is so Ordered this 6th day of April, 1945.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Apr. 6, 1945. [263]

[Title of District Court and Cause.]

DECISION AND ORDER PURSUANT TO MAN-
DATE ON REVIEW OF REFEREE'S ORDER
OF NOVEMBER 12, 1941, DISALLOWING
THE CLAIM OF THE COLLECTOR OF IN-
TERNAL REVENUE FOR 1938 AND 1939
FEDERAL INCOME TAXES.

The F. P. Newport Corporation, Ltd. was adjudicated a bankrupt by an Order of this Court on the 12th day of January, 1937. Thereafter, and on the 18th day of March, 1937, H. F. Metcalf was appointed Trustee in Bankruptcy. The Collector of Internal Revenue presented a claim in this proceeding for the aggregate sum of Nineteen Thousand, Three Hundred Sixty-three Dollars and Sixty-five Cents (\$19,363.65), alleged to be due from the Trustee in Bankruptcy as income taxes for the calendar years 1938 and 1939. On September 27, 1940, the Trustee in Bankruptcy filed an objection to the allowance of the claim submitted by the Collector of Internal Revenue. On March 17, 1941, the [3] Referee in Bankruptcy entered an Order sustaining the objections of the Trustee and disallowing the claim filed by the Collector of Internal Revenue for 1938 and 1939 income taxes in its entirety. On the 22nd day of April, 1941, the United States petitioned for a review of the Referee's Order of disallowance dated March 17, 1941, after having, on March 22, 1941, obtained an Order extending the time to file said review to and including the 23rd day of April, 1941. Thereafter, and on the 23rd day of October, 1941, the

District Court returned the matter to the Referee in Bankruptcy with instructions for the making and entry of Findings of Fact, Conclusions of Law and Order. The Referee in Bankruptcy entered his Findings of Fact, Conclusions of Law and Order on the 12th day of November, 1941, again sustaining the objections of the Trustee in Bankruptcy and disallowing the claim presented by the Collector of Internal Revenue in its entirety. Thereafter, and on the 18th day of November, 1941, the United States petitioned for a review of the Referee's Order of November 12, 1941. On the 17th day of December, 1941, this Court entered an Order confirming and approving the Findings of Fact, Conclusions of Law and Order of the Referee dated November 12, 1941, which disallowed in its entirety the claim presented for 1938 and 1939 income taxes. On November 23, 1942, the Circuit Court of Appeals for the Ninth Circuit rendered a decision reversing the Order of this Court of December 17, 1941. Thereafter, and on the 20th day of January, 1943, a Petition to the Supreme Court of the United States for a Writ of Certiorari was filed and thereafter said Petition for Certiorari was denied by the Supreme Court on March 1, 1943, and the Mandate from the said Circuit Court of Appeals for the Ninth Circuit, having on the 25th day of March, 1943, been spread upon the Minutes of this Court, [4]

Now, Therefore, by virtue of the law and by reason of the Mandate aforesaid, it is Considered, Ordered and Determined by the Court that the Trustee in Bankruptcy,

as such trustee, and the bankrupt estate is indebted to the United States of America as alleged and set forth in the said claim filed by the Collector of Internal Revenue in the sum of Nineteen Thousand, Three Hundred Sixty-three Dollars and Sixty-five Cents (\$19,363.65) for 1938 and 1939 income taxes, and the Referee's Order of November 12, 1941, disallowing the claim presented by the Collector of Internal Revenue on behalf of the United States is reversed and said claim is allowed in full together with interest thereon as provided by law.

Dated: This 8th day of April, 1943.

PAUL J. McCORMICK
United States District Judge.

Approved as to Form:

BAILEY, TURNER & LAKE
By ALLEN T. LYNCH
Attorneys for Trustee

Order entered Apr. 8-1943; docketed Apr. 8-1943, book 15, page 755. Edmund L. Smith, Clerk; by B. B. Hansen, Deputy.

Notation made in Bankruptcy Docket on Apr. 8, 1943 pursuant to Rule 79 (a) Civil Rules of Procedure. Edmund L. Smith, Clerk U. S. District Court, Southern District of California; by B. B. Hansen, Deputy.

[Endorsed]: Filed Apr. 8, 1943. [5]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the attorneys for the United States of America, claimant-appellee, the attorneys for the Security-First National Bank of Los Angeles, appellant, and the attorneys for H. F. Metcalf, Trustee in Bankruptcy for the above named bankrupt, that a Creditors' Involuntary Petition in Bankruptcy, in the Matter of F. P. Newport Corporation, Ltd., a corporation, an alleged Bankrupt, case No. 25-308 M, was filed in the above entitled court on March 19, 1935, and on January 12, 1937, the Honorable Wm. P. James, Judge of the above entitled court, after duly considering the said Creditors' Involuntary Petition in Bankruptcy, adjudicated F. P. Newport Corporation, Ltd., a corporation, a bankrupt.

It Is Further Stipulated, that this stipulation shall be included and contained in the record on appeal of the Security-First National Bank of Los Angeles, from the Order of the above entitled Court, entered February 6, 1945.

Dated: April 3, 1945.

CHARLES H. CARR

United States Attorney [1]

E. H. MITCHELL

Asst. United States Attorney

GEORGE M. BRYANT

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney Bureau of

Internal Revenue

By Eugene Harpole

Attorneys for Claimant-Appellee

BAILIE, TURNER & LAKE

By Allen T. Lynch

Attorneys for H. F. Metcalf, Trustee

W. C. SHELTON and

GEORGE W. BURCH,

By W. C. Shelton

Attorneys for Appellant Security-First

National Bank of Los Angeles

It Is So Ordered.

Dated: April 4th, 1945.

PAUL J. McCORMICK

Judge of the United States District Court

[Endorsed]: Filed Apr. 4, 1945.] [2]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the attorneys for the United States of America, claimant appellee, the attorneys for the Security-First National Bank of Los Angeles, appellant, and the attorneys for H. F. Metcalf, Trustee in Bankruptcy for the above named Bankrupt, pursuant to the provisions of Section 75, subdivision (i) of the Federal Rules of Civil Procedure of the United States of America, that the transcript of the record in the Matter of United States of America, appellant -vs- H. F. Metcalf, appellee, United States Circuit Court of Appeals for the Ninth Circuit, No. 10130, marked "U. S. Appellee's Designation No. 2" shall be sent to the Ninth Circuit Court of Appeals, in lieu of copies, and that the clerk of the above entitled court shall transport said

transcript to said Ninth Circuit Court of Appeals for safekeeping, and which transcript shall in turn be returned by the clerk of said Circuit Court of Appeals to the clerk of the above District Court when the Judgment of said Circuit Court of Appeals in connection with the pending appeal of said appellant becomes final. [265]

Dated: March 28, 1945.

CHARLES H. CARR
United States Attorney
E. H. MITCHELL
Asst. United States Attorney
GEORGE M. BRYANT
Asst. United States Attorney
EUGENE HARPOLE
Special Attorney Bureau of
Internal Revenue
By Eugene Harpole
Attorneys for Claimant-Appellee
BAILIE, TURNER & LAKE
By Allen T. Lynch
Attorneys for H. F. Metcalf, Trustee
W. C. SHELTON and
GEORGE W. BURCH, JR.
By George W. Burch, Jr.
Attorneys for Appellant Security-First
National Bank of Los Angeles.

It Is So Ordered.

Dated: March 30th, 1945.

PAUL J. McCORMICK
Judge of United States District Court

[Endorsed]: Filed Mar. 30, 1945. [266]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 266 inclusive contain full, true and correct copies of Stipulation and Order filed April 4, 1945; Decision and Order Pursuant to Mandate on Review of Referee's Order of November 12, 1941, Disallowing the Claim of the Collector of Internal Revenue for 1938 and 1939 Federal Income Taxes; Referee's Certificate on Review; Petition for Order to Show Cause Why Trustee Should Not Be Directed to Pay 1938 and 1939 Federal Income Taxes; Answer of Security-First National Bank of Los Angeles to Petition of United States of America re Payment of 1938 and 1939 Income Taxes; Answer of H. F. Metcalf, as Trustee in Bankruptcy, to Petition of United States of America re Payment of 1938 and 1939 Income Taxes; Findings of Fact, Conclusions of Law and Order re Payment of Federal Income Taxes for Calendar Years 1938 and 1939; Order Extending Time to File Petition for Review; Petition for Review of Referee's Order; a portion of U. S. Exhibit No. 1; Trustee's Exhibit C; Security-First National Bank's Exhibits Nos. 1 to 5 inclusive; Findings of Fact, Conclusions of Law and Order of the District Judge Upon Review of the Referee's Order Dated June 6, 1944, Directing Payment of 1938 and 1939 Federal Income Taxes; Notice of Motion; Order Fixing Supersedeas Bond on Appeal; Notice of Appeal; Supersedeas Bond on Appeal; Appellant's Statement of Points to Be Urged Upon Appeal; Appellant's Designation of Contents of Record on Appeal; Stipulation and Order filed April 6, 1945; Appellee's Designa-

tion of Additional Contents of Record on Appeal and Stipulation and Order filed March 30, 1945, which, together with Original U. S. Exhibit 1 and copy of Reporter's Transcript transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$45.65 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 30 day of April, 1945.

[Seal]

EDMUND L. SMITH,
Clerk,

By Theodore Hocke
Chief Deputy Clerk.

[Endorsed]: No. 11051. United States Circuit Court of Appeals for the Ninth Circuit. Security-First National Bank of Los Angeles, a national banking association, Appellant, vs. United States of America and H. F. Metcalf, Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., a corporation, bankrupt, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed May 2, 1945.

PAUL P. O'BRIEN.

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

In the Matter of

F. P. NEWPORT CORPORATION, LTD.,
a corporation,

Bankrupt.

APPELLANT'S STATEMENT OF POINTS TO BE
URGED ON APPEAL

1. That the District Court and the Referee in Bankruptcy erred in ordering H. F. Metcalf, Trustee in Bankruptcy for the above named Bankrupt, to pay to the Collector of Internal Revenue of the United States the Federal Income Tax assessed for the calendar years 1938 and 1939, and interest thereon, out of oil and gas royalties and surface rentals received or to be received by the said Trustee in Bankruptcy from properties, the record title to which stands in the name of the Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, for the reason that under and by virtue of that certain contract of January 12, 1937, as supplemented and modified, between the Security-First National Bank of Los Angeles, F. P. Newport Corporation, Ltd., a Bankrupt, and H. F. Metcalf, as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., a Bankrupt, the said oil and gas royalties and surface rentals received or to be received by the said Trustee in Bankruptcy were sequestered for the payment of the indebtedness of said Bankrupt corporation to the Security-First National Bank of Los Angeles, said debt being in excess of \$600,000.00

as of the date of said Referee's order; that said sequestered funds were to be free of any recourse thereto by the Trustee in Bankruptcy for the payment of any costs and expenses incurred by him as such Trustee, and free and clear of any claims thereto by any creditor of said Trustee in Bankruptcy, including the Collector of Internal Revenue and the United States Government for income taxes, and free from any general creditor's claims in the Bankruptcy Proceedings.

2. That the District Court and the Referee in Bankruptcy erred in ordering H. F. Metcalf, Trustee in Bankruptcy of the above named Bankrupt, for the purpose of making said payment of income taxes for the calendar years 1938 and 1939, and interest thereon, to use any funds on deposit in the special accounts carried in his name as said Trustee in Bankruptcy at the Head Office of the Security-First National Bank of Los Angeles, Sixth and Spring Streets, Los Angeles, California, and Citizens National Trust and Savings Bank, 5th and Spring Streets, Los Angeles, California, for the reason that under and by virtue of that certain contract of January 12, 1937, as supplemented and modified, said special accounts comprised and consisted only of the rents, issues and profits received or to be received by said Trustee in Bankruptcy from properties, the record title to which stood in the name of Security-First National Bank of Los Angeles as Trustee under its Trust D 7224, and which amounts were sequestered for the payment of the indebtedness due from F. P. Newport Corporation, Ltd., a bankrupt, to the Security-First National Bank of Los Angeles.

3. That the District Court and the Referee in Bankruptcy erred in denying the Petition and Prayer of Security-First National Bank of Los Angeles that said Trustee in Bankruptcy be required to pay over to the said Bank the oil and gas royalties and surface rentals received, or to be received, by the said Trustee in Bankruptcy from the properties the record title to which stands in the name of said Bank as Trustee under its Trust D 7224, for the reason that under and by virtue of said contract of January 12, 1937, as supplemented and modified, the said oil and gas royalties and surface rentals received or to be received by said Trustee in Bankruptcy from said properties were sequestered for the payment of the indebtedness due from said Bankrupt to the Security-First National Bank of Los Angeles.

4. That the Referee in Bankruptcy erred in holding that as to the Security-First National Bank of Los Angeles, the said Trustee in Bankruptcy was, during the calendar years of 1938 and 1939, operating property of said Bankrupt, the record title to which is held by the Security-First National Bank of Los Angeles, within the meaning of Section 52 (a) of the Revenue Code, and Section 19.52-a of Treasury Regulations 103, since the said Trustee in Bankruptcy's operation thereof was for liquidation purposes and as limited by said contract of January 12, 1937, as supplemented and modified.

5. That the District Court and the Referee in Bankruptcy erred in holding that the net income received by said Trustee in Bankruptcy during the calendar years 1938 and 1939, respectively, from properties, the record

title to which is held by Security-First National Bank of Los Angeles under its Trust D 7224, under and by virtue of said contract of January 12, 1937, as supplemented and modified, was subject to Federal Income tax within the meaning of Section 52 (a) of the Revenue Act of 1938, and of the Internal Revenue Code, for the reason that under the provisions of said contract, as supplemented and modified, the said net income was sequestered for the payment of indebtedness owed by the Bankrupt corporation to the Security-First National Bank of Los Angeles.

6. That the District Court and the Referee in Bankruptcy erred in holding that the properties, the record title to which is held by the Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, and as security for the obligation owed by the Bankrupt Corporation to said Bank, have been administered by said Trustee in Bankruptcy by and with the consent and approval of said Bank, and for the benefit of said Bank, for the reason that said Trustee in Bankruptcy's possession of said properties are for liquidation purposes only, as provided by the said contract of January 12, 1937, as supplemented and modified.

7. That the District Court and the Referee in Bankruptcy erred in holding that the income tax for the calendar years 1938 and 1939 was the result of the production of income, the full benefit and enjoyment of which was held by the Security-First National Bank of Los Angeles, for the reason that the income tax was levied against the said Trustee in Bankruptcy and not against the said Security-First National Bank of Los Angeles,

and for the further reason that said income tax, by virtue of said contract of January 12, 1937, as supplemented and modified, cannot be charged against oil and gas royalties and surface rentals received or to be received from properties, the record title to which is held by the said Bank.

8. That the District Court and the Referee in Bankruptcy erred in holding that the properties the record title to which is held by said Bank under its Trust D 7224, as security for the obligation owing to said Bank by the Bankrupt have been administered by said Trustee in Bankruptcy by and with the consent and approval of said Bank and for the benefit of said Bank.

9. That the District Court and the Referee in Bankruptcy erred in holding that the income taxes for the years 1938 and 1939 are incidental to said Bankruptcy administration, and a necessary part of the expense of operating, pursuing, collecting, and liquidating the properties and distributing the proceeds thereof, in so far as said Security-First National Bank of Los Angeles is concerned, for the reason that under the provisions of said contract of January 12, 1937, as supplemented and modified, all of the oil and gas royalties and surface rentals received and to be received by said Trustee in Bankruptcy, which includes all sums in the special bank accounts standing in the name of the Trustee in Bankruptcy, from properties the record title to which is held by the Security-First National Bank of Los Angeles, were sequestered for the payment of the indebtedness of said Bankrupt to said Bank.

10. That the District Court and the Referee in Bankruptcy erred in holding that Security-First National Bank

of Los Angeles, having the full benefit of the income which resulted in the assessment of said taxes, should pay the taxes out of that income, for the reason that the tax assessed for the years 1938 and 1939 were assessed against the said Trustee in Bankruptcy and for his operations and not against said Security-First National Bank of Los Angeles.

11. That the District Court and the Referee in Bankruptcy erred in holding that by the provisions of said agreement of January 12, 1937, as supplemented and modified, the oil and gas royalties received from Universal Consolidated Oil Company, lessee of property, the title to which stands in the name of Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, can be used for the payment of income taxes assessed against the Trustee in Bankruptcy and the Bankrupt Estate, for the reason that said contract, as supplemented and modified, provides that such income is sequestered for the benefit of the Security-First National Bank of Los Angeles, to be applied by said Bank on the indebtedness due it from said Bankrupt Corporation.

12. That the District Court and the Referee in Bankruptcy erred in holding that if the funds on deposit in said special bank accounts, which comprises the income collected from properties the record title to which stands in the name of the Security-First National Bank of Los Angeles, as Trustee under its Trust D 7224, are insufficient to pay said claim of the United States of America and the Collector of Internal Revenue for income taxes for the calendar years 1938-1939, plus interest thereon, such deficiency should be paid by the Trustee in Bankruptcy out of oil and gas royalties when and as received by him from Universal Consolidated Oil Company, for

the reason that such rents, issues and profits, by virtue of the provisions of said contract of January 12, 1937, as supplemented and modified, were sequestered for the payment of the indebtedness due said Bank by said Bankrupt corporation.

Dated: April 17, 1945.

W. C. SHELTON &
GEORGE W. BURCH, JR.
By W. C. Shelton
Attorneys for Appellant.

Received copy of the within Appellant's Statement this 19th day of April, 1945.

CHARLES H. CARR
United States Attorney
E. H. MITCHELL
Asst. United States Attorney
GEORGE M. BRYANT
Asst. United States Attorney
EUGENE HARPOLE
Special Attorney Bureau of
Internal Revenue
By Eugene Harpole by B.H.
Attorneys for Claimant-Appellee
BAILIE, TURNER AND LAKE
By Allen E. Turner
Attorneys for H. F. Metcalf
Trustee in Bankruptcy.

[Endorsed]: Filed May 2, 1945. Paul P. O'Brien,
Clerk.

11051 - No. 11059

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the
Estate of F. P. Newport Corporation, Ltd., a corpora-
tion, Bankrupt, and SECURITY FIRST NATIONAL
BANK OF LOS ANGELES,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

— FILED —

AUG 24 1945

PAUL P. O'BRIEN,
CLERK

No. 11059

IN THE

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the
Estate of F. P. Newport Corporation, Ltd., a corpora-
tion, Bankrupt, and SECURITY FIRST NATIONAL
BANK OF LOS ANGELES,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

CHARLES H. CARR,
United States Attorney,

E. H. MITCHELL,
Assistant U. S. Attorney,

GEORGE M. BRYANT,
Assistant U. S. Attorney,

EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
600 U. S. Post Office and Court House Bldg.
Los Angeles 12, Calif.

For Appellee H. F. Metcalf, etc.:

BAILIE, TURNER & LAKE
811 Citizens National Bank Bldg.
Los Angeles 13, Calif.

For Appellee Security First National Bank of Los Angeles:

W. C. SHELTON and
GEORGE W. BURCH, JR.
923 Subway Terminal Bldg.
Los Angeles 13, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

United States of America

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 25308-M

In the Matter of

F. P. NEWPORT CORPORATION, LTD, a corporation,

Bankrupt.

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Paul J. McCormick, Judge of the District Court of the United States, Southern District of California, Central Division:

I, Ernest R. Utley, Referee in Bankruptcy, to whom the proceedings in this matter were referred, do hereby certify:

1. That on January 12, 1937, F. P. Newport Corporation, Ltd. was duly adjudicated a Bankrupt and proceedings in relation to said bankrupt estate were duly referred to this Referee.
2. That on March 18, 1937, H. F. Metcalf was duly appointed Trustee in Bankruptcy for said Bankrupt Estate, duly qualified as such Trustee, and ever since has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy of said Bankrupt Estate.
3. That subsequent to the adjudication in bankruptcy herein an agreement was entered into between the Security-First National Bank of Los Angeles, the Bankrupt Corporation and said Trustee in Bankruptcy, dated January 12, 1937, which agreement, together with the supplement thereto, dated August 31, 1937, provided that

an indebtedness owing said Bank in excess of \$1,350,000.00 and secured [2] by a Trust covering approximately 90% of all of the property in said Bankrupt Estate, should be payable in installments as follows:

\$ 35,000.00 on or before March 7, 1938;
\$ 65,000.00 on or before September 7, 1938;
\$250,000.00 on or before September 7, 1939;
\$150,000.00 on or before March 7, 1940, and the remaining unpaid principal on or before September 7, 1940.

By the terms of said agreement there was to be paid to said Bank, in addition to the principal of the secured indebtedness above noted, interest at 4% on the unpaid principal, said interest to be payable quarterly on March 7th, June 7th, September 7th, and December 7th of each year.

4. Said agreement and supplement and certain modifications thereof were duly approved by an order made and signed by the Hon. Paul J. McCormick on November 5, 1937, said last-mentioned order was duly affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, and a Petition for Writ of Certiorari was denied by the Supreme Court of the United States.

5. By the terms of the agreement hereinbefore mentioned there became due and payable to said Security-First National Bank of Los Angeles on September 7, 1944, the sum of \$5,534.11, as interest on the principal obligation owing said Bank. That pursuant to the terms and provisions of a Community Oil and Gas Lease entered into by and between the Trustee and the said Bank, as Lessors, and the Bankline Oil Company, as Lessee, the

said Bank received \$229.64, and the further sum of \$40.36 on account of interest collected under the terms of certain contracts of sale covering real property, title to which stood in the name of said Bank as security for said debt, making a total of \$270.00 which, applied on the interest due September 7, 1944, left a balance of \$5,264.00 owing said Bank.

6. That on the 13th day of September, 1944, the Trustee in [3] Bankruptcy filed with this Court his Petition for Authority to Pay to said Bank the balance of the interest hereinbefore mentioned out of the Trustee's Special Oil Account; that on said day an Order to Show Cause was duly issued directed to the United States of America, and Harry C. Westover, as Collector of Internal Revenue, and to Security-First National Bank of Los Angeles, requiring them and each of them to appear before this Court on the 26th day of September, 1944, to show cause, if any or either of them might have, why an order should not be made and entered directing said Trustee to pay said interest out of said funds; that service of said petition and said Order to Show Cause was duly had on the parties therein designated, and the matter came on for hearing on the 26th day of September, 1944, and on said day was duly continued until the 6th day of October, 1944, and on said last-mentioned date said Order to Show Cause and said petition came on regularly for hearing before this Court, Messrs. Bailie, Turner & Lake, by Allen T. Lynch, appearing as Counsel for the Trustee in Bankruptcy, W. C. Shelton, Esq. and George W. Burch, Jr., Esq., appearing as Counsel for the Security-First National

Bank of Los Angeles, and Eugene Harpole appearing for the United States of America and Harry C. Westover, Collector of Internal Revenue. Thereupon it was stipulated in open court that if Mr. Metcalf, the Trustee in Bankruptcy were called he would testify in accordance with the allegations set forth in said petition. No written objections to the payment of said interest out of said funds were filed by the United States of America, and the Court having considered said petition and taking judicial notice of the records and files in this matter contained found and determined that said interest should be paid out of the Trustee's said Special Oil Account, and made and signed its order in accordance therewith on the 17th day of October, 1944.

7. There is now owing and unpaid to said Bank on account of the secured obligation hereinbefore mentioned in excess of \$450,000.00 in principal; that heretofore and on the 31st day of [4] October, 1944, the Referee made an order herein denying without prejudice the petition of the Security-First National Bank of Los Angeles for leave to foreclose under the terms of its Trust, pursuant to which it held title to the bulk of the properties of this estate as security for the money so owing it. By the terms of said order it was provided, among other matters, that the Bank might renew said petition to foreclose at any time on or before June, 1945, if there should be a change in circumstances which would seriously prejudice the interests or security of said Bank. Heretofore interest owing said Bank has been duly paid as it fell due, pursuant to the orders of this Court. Said Bank now

threatens to renew its said petition for leave to foreclose if the interest above mentioned is not paid.

8. The oil funds on deposit in the Trustee's Special Oil Account at the time of the hearing of this matter amounted to approximately \$43,000.00, and the Trustee expected to receive additional royalties which would more than equal the interest above mentioned.

9. That it was and is the opinion of the Referee herein that in the event the Referee's Order heretofore made directing the Trustee to pay out of said oil funds income taxes assessed against the Trustee in Bankruptcy, as such, should become final, then and in that event they would be entitled to no priority in payment over any other expenses of administration, but would be entitled to payment only on a pro rata basis with other expenses of administration, assuming there are insufficient funds to pay all of such expenses. It is further the opinion of the Referee herein that current interest due the Security-First National Bank of Los Angeles under the terms of the agreement hereinbefore mentioned is a proper expense of administration and since there would be in said Oil Account more than sufficient to pay the interest installment above mentioned and the taxes which the Referee has heretofore directed paid to the United States Government, then no prejudice would result to the United States by the payment of [5] said interest.

10. The Trustee is receiving from the oil and gas royalties and deposited in said Special Oil Account between \$5,000.00 and \$6,000.00 each month.

11. Heretofore and within the time allowed by law, the United States of America filed a Petition for Review of the Order hereinbefore mentioned and dated October 17, 1944.

12. The Referee submits herewith the following:

- (a) Original Petition of H. F. Metcalf, as Trustee in Bankruptcy, for authority to pay said interest hereinbefore mentioned;
- (b) Original Order to Show Cause issued to the United States of America, et al. re the hearing on said Petition and hereinbefore mentioned;
- (c) Original Order dated October 17, 1944, and directing payment of said interest;
- (d) Original Petition for Review of said Order signed by the United States of America. (Accompanying the Certificate on Review prepared and signed by this Referee and filed with the Court re the review of the Order of June 6, 1944, (affirming which the Court issued a Memorandum Opinion dated January 6, 1945) is a copy of the agreement made and entered into with the Bank, supplement and modifications thereof, heretofore in this Certificate mentioned.) ; and
- (e) Reporter's Transcript.

Dated this 10th day of Feb., 1945.

ERNEST R. UTLEY
Referee in Bankruptcy

[Endorsed]: Filed Feb. 10, 1945. [6]

[Title of District Court and Cause.]

PETITION FOR AUTHORITY TO PAY INTEREST
TO SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES OUT OF TRUSTEE'S SPECIAL
OIL ACCOUNT AND FOR ORDER TO SHOW
CAUSE.

Petitioner, H. F. Metcalf, respectfully represents to the Court:

1. That petitioner is the duly appointed, qualified, and acting Trustee in Bankruptcy herein.
2. That heretofore, by and with the approval of this Court, petitioner, as such Trustee in Bankruptcy, Security-First National Bank of Los Angeles, and the bankrupt, as lessors, made and entered into a certain oil and gas lease with Universal Consolidated Oil Company, as lessee, under and pursuant to the terms and provisions of which certain property of this estate was let to said lessee for the purpose of prospecting for and producing oil and gas therefrom; that a copy of said lease is on file with this Court and the contents thereof are known to the respondents and each of them hereinafter named.
3. That heretofore and on or about January 12, 1937, a certain agreement was made and entered into by and between the Trustee in Bankruptcy herein, said bank, and the bankrupt; that the execution of said agreement, a supplement thereto, and modifications thereof, was [7] duly approved by this Court, and copies thereof are on file with this Court and the contents thereof are known to the respondents and each of them hereinafter named; that in and by said agreement it was provided, among other things, that there should be paid to said bank interest at 4% per annum on the principal balance of the obligation or indebtedness owing to said bank and more particularly

referred to and described in said agreement, said interest being payable quarterly; that it was further provided that income from oil produced or extracted from the properties of the estate, the record title to which was held by said bank as security for the obligation owing it, should be placed in a Special Oil Account, and that the funds therein should be available to the Trustee in Bankruptcy from time to time for the purpose of paying interest, taxes, assessments, and expenses; that the Trustee in Bankruptcy carries at the Head Office of said Security-First National Bank of Los Angeles a Special Oil Account in the name of the Trustee, in which there is deposited from time to time royalties received by the Trustee from Universal Consolidated Oil Company the lease hereinbefore mentioned; that there is presently on deposit in said account the sum of \$37,256.23.

4. That there is now due, owing and unpaid to said bank on account of interest for the quarter ending September 7, 1944, the sum of \$5,534.11; that said Bank has received, under and pursuant to the terms and provisions of a certain oil and gas lease entered into by and between the Trustee and the said bank, as Lessors, and the Bankline Oil Company the additional sum of \$229.64, all as more particularly set forth in Exhibit "A" attached hereto, and by reference made a part hereof; that said bank has likewise received on account of interest collected under the terms of certain conditional sale contracts held by said bank and covering properties of this estate sold on contract, the sum of \$40.36, all as more particularly detailed in said Exhibit "A"; that the total amount so received by said bank as hereinbefore alleged amounts to the sum of \$270.00. [8]

5. That heretofore the United States of America filed in this proceeding a petition wherein it sought an

order directing the Trustee in Bankruptcy herein to pay income taxes in the amount of \$19,362.65; that heretofore upon proceedings duly had before this Court an order was made and signed by the Court on the 6th day of June, 1944, directing the Trustee to pay said taxes out of said Special Oil Account hereinbefore mentioned; that in and by the terms of said order it was provided, among other things, that upon application of said Security-First National Bank of Los Angeles a stay of execution was granted for a period of five days from and after final determination of any review from said order that might be duly prosecuted by said bank; that a petition for review of said order has been duly filed by said Court and the review of said order is now pending and undetermined.

6. That petitioner estimates that on or about the 20th day of September, 1944, he will receive from said Universal Consolidated Oil Company further royalties in the approximate sum of \$5,200.00 for the production for the month of August, 1944; that if said Security-First National Bank of Los Angeles is authorized by this Court to apply the sum of \$270.00 hereinbefore mentioned toward partial liquidation of said interest owing to it as aforesaid then the additional amount necessary to pay said interest in full will be \$5,264.11, and if said sum is paid out of said Special Oil Account the receipt of said royalties for the month of August, 1944, in approximately the same amount will be sufficient to replenish said Special Oil Account.

7. That the total amount of the claim of the United States government hereinbefore mentioned, with interest thereon, is approximately \$25,311.80.

8. That there has been filed and is still pending and undetermined an additional claim of the United States

government for income taxes in the amount of \$35,040.82, which, with interest thereon, amounts to approximately \$40,113.98.

9. That petitioner is uncertain as to whether or not under the [9] circumstances and in view of the pendency of said claims of the United States government and the order hereinbefore made said interest of said bank should not be paid out of said funds.

Wherefore Petitioner prays that an order to show cause be issued by this Court directed to the United States of America and Harry C. Westover, as Collector of Internal Revenue, and to Security-First National Bank of Los Angeles, requiring them and each of them to be and appear before this Court at a time and place to be fixed by the Court, and then and there show cause, if any they or either of them may have, why an order should not be made and signed herein, directing and authorizing the Trustee in Bankruptcy herein to pay to said Security-First National Bank of Los Angeles out of the Trustee's Special Oil Account carried in his name at the Head Office of Security-First National Bank of Los Angeles, Sixth and Spring Streets, Los Angeles, California, the sum of \$5,264.11, with instructions to said bank to use said sum and moneys heretofore received and collected by it to pay interest owing said bank for the quarter ending September 7, 1944, and that upon the hearing of this petition and said order to show cause an appropriate order be made and signed herein.

H. F. METCALF

Trustee in Bankruptcy of F. P. Newport Corporation,
Ltd., a corporation, Petitioner.

BAILIE, TURNER & LAKE

By Allen T. Lynch

Attorneys for Trustee. [10]

EXHIBIT "A"

H. F. METCALF, TRUSTEE IN BANKRUPTCY
FOR F. P. NEWPORT CORPORATION, LTD.

Statement of Amounts Payable to Security-First National
Bank to September 7, 1944

Interest Payment

Interest on Principal Balance—June 7, 1944 to Sept. 7, 1944	\$5,534.11
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Deduct, Credits Held by BankOil Royalty Account

June 21, 1944 Bankline Oil Company	\$ 81.49
July 20, 1944 Bankline Oil Company	80.30
Aug. 21, 1944 Bankline Oil Company	<u>67.85</u>

Total Oil Royalty Account \$229.64

Interest Collections

June 7, 1944 Interest Collected	\$15.23
July 7, 1944 Interest Collected	2.25
Aug. 31, 1944 Interest Collected	<u>22.88</u>

Total Interest Collections 40.36

Total Credit to Be Deducted 270.00

Net Amount of Check \$5,264.11

[Verified.]

[Endorsed]: Filed Sep. 13, 1944 at 20 Min. Past 10 o'clock A. M. Ernest R. Utley, Referee. R. Clerk.

Received copy of the within this 19 day of Sept., 1944. Charles H. Carr, U. S. Atty., by R. MacKay.

[Endorsed]: Filed Feb. 10, 1945. [12]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE PAYMENT OF
INTEREST DUE SECURITY-FIRST NATION-
AL BANK OF LOS ANGELES

On reading and filing the verified petition of H. F. Metcalf, Trustee in Bankruptcy herein, and good cause appearing therefor,

It Is Hereby Ordered:

1. That the United States of America and Harry C. Westover, as Collector of Internal Revenue, and Security-First National Bank of Los Angeles be and appear before this Court in its court room, 324 Federal Building, Temple and Spring Streets, Los Angeles, California, on the 26th day of September, 1944, at the hour of 10 o'clock A. M. of said day, and then and there show cause, if any they or either of them may have, why an order should not be made and signed herein authorizing and directing the Trustee in Bankruptcy herein to pay to the Security-First National Bank of Los Angeles, out of the Trustee's Special Oil Account, the sum of \$5,264.11, with instructions to said bank to use said sum, and the sum of \$270.00 collected by it as in its said petition alleged, for

the purpose of paying interest owing said bank for the quarter ending September 7, 1944, all as more particularly referred to in said petition.

2. That a copy of this order to show cause and the petition [13] herein referred to be served upon said United States of America and Harry C. Westover, as Collector of Internal Revenue, and upon Security-First National Bank of Los Angeles, by delivering a copy of each said order to show cause and said petition to

Eugene Harpole, Special Attorney, Bureau of Internal Revenue, or

Charles H. Carr, United States Attorney,

as attorneys for said United States of America and said Collector of Internal Revenue, and by delivering a copy of each said order to show cause and said petition to

W. C. Shelton,

as attorney for said Security-First National Bank of Los Angeles; said service to be made at least five days before the date set for the hearing of this order to show cause by any male citizen of the United States of America over the age of twenty-one years; and that no other or further service of this order to show cause or of said petition need be made.

Dated this 13 day of September, 1944.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed Sep. 13, 1944, at 20 Min. Past 10 o'clock A. M. Ernest R. Utley, Referee. R. Clerk.

[Endorsed]: Filed Feb. 10, 1945. [14]

[Title of District Court and Cause.]

ORDER AUTHORIZING PAYMENT OF INTEREST
TO SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES OUT OF TRUSTEE'S SPECIAL
OIL ACCOUNT.

That on or about September 13, 1944, the Trustee in Bankruptcy herein filed a Petition for Authority to Pay Interest to Security-First National Bank of Los Angeles Out of Trustee's Special Oil Account and for Order to Show Cause thereunder. That on the filing of said petition an order to show cause was issued by this Court, directed to Security-First National Bank of Los Angeles, United States of America and Harry C. Westover, as Collector of Internal Revenue of the United States of America, directing them to appear before this Court in its Court Room, 324 Federal Building, Temple and Spring Streets, Los Angeles, California, on the 26th day of September, 1944, at the hour of 10 o'clock A. M. of said day, and then and there show cause why the relief prayed for in said petition should not be granted. That on said 26th day of September, 1944, at the hour of 10 o'clock A. M., said petition and order to show cause came on regularly before this Court and was then duly and regularly continued until the 5th day of October, 1944; that thereafter and on said last-mentioned date at the hour of 10 o'clock A. M. said order and said petition came on regularly for hearing, Messrs. Bailie, Turner & Lake, by Allen T. Lynch, [15] appearing as counsel for said Trustee in Bankruptcy, W. C. Shelton, Esq., and George W. Burch, Jr., Esq., appearing for the Security-First National Bank of Los Angeles, Eugene Harpole, Esq., appearing as counsel for the United States of America, and Harry C. Westover, as Collector of Internal Revenue,

and no written objections having been filed to said petition, and the Court having heard and considered the argument of counsel, certain stipulations made and entered into in open Court, and said petition, and being fully advised in the premises, and good cause appearing therefor,

It Is Ordered:

1. That H. F. Metcalf, as Trustee in Bankruptcy herein, be and he is hereby authorized and directed to pay to Security-First National Bank of Los Angeles out of the Trustee's Special Oil Account carried in his name as such Trustee in Bankruptcy at the Head Office of said Bank, Sixth and Spring Streets, Los Angeles, California, the sum of \$5,264.11, with instructions to said Bank to use said sum to apply on account of interest due and owing said Bank on September 7, 1944, under the agreement, modifications and supplement thereof described in said petition.
2. That said Security-First National Bank of Los Angeles is directed and ordered to use and apply the sum of \$270.00 heretofore collected by it from the Bankline Oil Company, alleged in Exhibit "A" of said petition, for the purpose of paying the balance of said interest, amounting in all to \$5,534.11.

Dated this 17 day of October, 1944.

ERNEST R. UTLEY
Referee in Bankruptcy

Approved as to Form:

W. C. SHELTON
EUGENE HARPOLE

[Endorsed]: Filed Oct. 17, 1944, at min. past
4 o'clock P. M. Ernest R. Utley, Referee. R. Clerk.

[Endorsed]: Filed Feb. 10, 1945. [16]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER
OF OCTOBER 17, 1944

Comes now the United States of America, by and through its attorneys, Charles H. Carr, United States Attorney, E. H. Mitchell, Assistant United States Attorney, George M. Bryant, Assistant United States Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and files this, its Petition for Review of that certain Order made by Referee in Bankruptcy, Ernest R. Utley, Esq., and entered in the above-entitled proceeding on the 17th day of October, 1944, ordering and authorizing H. F. Metcalf as Trustee in Bankruptcy, to pay to the Security-First National Bank of Los Angeles out of the Trustee's special oil account the sum of \$5,264.11 to apply on account of interest due and owing said bank on September 7, 1944, and further directing said Security-First National Bank of Los Angeles to apply the sum of \$270.00 theretofore collected by it from the Bankline Oil Company upon the balance of said interest, the total of said authorized payments amounting to \$5,534.11. Said Order reads as follows, to wit:

"That on or about September 13, 1944, the Trustee in Bankruptcy herein filed a Petition for Authority to Pay Interest to Security-First [17] National Bank of Los Angeles Out of Trustee's Special Oil Account and for Order to Show Cause thereunder. That on the filing of said petition an order to show cause was issued by this Court, directed to Security-First National Bank of Los Angeles, United States of America and Harry C. Westover, as Collector of Internal Revenue of the United States of America, directing them to appear before this Court

in its Court Room, 324 Federal Building, Temple and Spring Streets, Los Angeles, California, on the 26th day of September, 1944, at the hour of 10 o'clock A. M. of said day, and then and there show cause why the relief prayed for in said petition should not be granted. That on said 26th day of September, 1944, at the hour of 10 o'clock A. M., said petition and order to show cause came on regularly before this Court and was then duly and regularly continued until the 6th day of October, 1944; that thereafter and on said last-mentioned date at the hour of 10 o'clock A. M. said order and said petition came on regularly for hearing, Messrs. Bailie, Turner & Lake, by Allen T. Lynch, appearing as counsel for said Trustee in Bankruptcy, W. C. Shelton, Esq. and George W. Burch, Jr., Esq., appearing for the Security-First National Bank of Los Angeles, Eugene Harpole, Esq., appearing as counsel for the United States of America, and Harry C. Westover, as Collector of Internal Revenue, and no written objections having been filed to said petition, and the Court having heard and considered the argument of counsel, certain stipulations made and entered into in open Court, and said petition, and being fully advised in the premises, and good cause appearing therefor,

It Is Ordered:

1. That H. F. Metcalf, as Trustee in Bankruptcy herein, be and he is hereby authorized and directed to pay to Security-First National Bank of Los Angeles out of the Trustee's Special Oil Account carried in his name as such Trustee in Bankruptcy [18] at the Head Office of said Bank, Sixth and Spring Streets, Los Angeles, California, the sum of \$5,264.11.

with instructions to said Bank to use said sum to apply on account of interest due and owing said Bank on September 7, 1944, under the agreement, modifications and supplement thereof described in said petition.

2. That said Security-First National Bank of Los Angeles is directed and ordered to use and apply the sum of \$270.00 heretofore collected by it from the Bankline Oil Company, alleged in Exhibit "A" of said petition, for the purpose of paying the balance of said interest, amounting in all to \$5,534.11.

Dated this 17 day of October, 1944.

s/ ERNEST R. UTLEY
Referee in Bankruptcy

Approved as to Form:

W. C. SHELTON
EUGENE HARPOLE"

In this Petition for a Review, the United States of America alleges that the Referee in Bankruptcy erred in said Order of October 17, 1944, in the following respects:

I.

The Referee in Bankruptcy erred in ordering and directing the Trustee in Bankruptcy to pay or permit to be paid the sum of \$5,534.11 or any other sum whatsoever to the Security-First National Bank of Los Angeles to apply upon interest due and owing said bank upon a debt of the bankrupt, before the income taxes due the United States from the bankrupt estate and its Trustee as such, for 1938, 1939 and subsequent taxable years in amounts shown by the petition upon which said order was based, to presently exceed the sum of \$65,000.00 have been paid in full. [19]

Dated: this 13th day of November, 1944.

CHARLES H. CARR,
United States Attorney

E. H. MITCHELL,
Asst. United States Attorney

GEORGE M. BRYANT,
Asst. United States Attorney

EUGENE HARPOLE
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Nov. 14, 1944, at 50 min. past 2 o'clock P. M. Ernest R. Utley, Referee. M. Clerk.

[Endorsed]: Filed Feb. 10, 1945. [20]

[Minutes: Tuesday, March 6, 1945]

Present: The Honorable Claude McColloch, District Judge.

The Petition of the Government filed in the above-entitled matter on November 14, 1944, for Review of Referee's Order of October 17, 1944, having come before the Court on February 26, 1945, for hearing on the petition and Certificate of the Referee, and the same having been argued by counsel and ordered submitted, and the Court having duly considered the same and the arguments of counsel, and being fully advised in the premises as to the facts and the law, now orders that the Order of the Referee herein of October 17, 1944, authorizing payment of interest to Security-First National Bank of Los Angeles out of Trustee's Special Oil Account, be, and the same hereby is, affirmed. Copies to counsel. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, claimant in the above entitled bankruptcy proceeding, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Southern District of California dated March 6, 1945, confirming and approving the Order of Ernest R. Utley, Referee in Bankruptcy, of October 17, 1944, authorizing payment of interest to Security-First National Bank of Los Angeles out of the Trustee's Special Oil Account. The Order hereby appealed from was made and entered in this action through the Honorable Claude McColloch, acting Judge of the above-entitled Court on the 6th day of March, 1945.

Dated: this 4th day of April, 1945.

CHARLES H. CARR,
United States Attorney

E. H. MITCHELL,
Asst. United States Attorney

GEORGE M. BRYANT,
Asst. United States Attorney

EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue

By Eugene Harpole

Attorneys for the United States of America,
Appellant.

[Endorsed]: Filed & mailed copy to Allen T. Lynch
and W. C. Shelton, attys. for appellees Apr. 4, 1945. [22]

[Minutes: Friday, April 13, 1945]

Present: The Honorable Paul J. McCormick, District Judge.

It is ordered that Findings of Fact, Conclusions of Law, and Order re Referee's Order of October 17, 1944, directing payment of interest to the Security-First National Bank of Los Angeles, signed at Portland, Oregon, by Judge McColloch, April 9, 1945, be filed and entered, and the same are entered in C. O. B. 32, page 52. [23]

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 25308-M

In the Matter of
F. P. NEWPORT CORPORATION, LTD., a Cor-
poration,

Bankrupt.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER RE REFEREE'S ORDER OF OC-
TOBER 17, 1944, DIRECTING PAYMENT OF
INTEREST TO SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES.

Be It Remembered: That heretofore, and on the 26th day of February, 1944, at the hour of 2 o'clock P. M. there came on regularly for hearing before the Honorable Claude McColloch, Judge of the above-entitled Court, the Petition for Review of the Order of the Honorable Ernest R. Utley, Referee in Bankruptcy, made and signed in the above-entitled bankruptcy proceedings on the 17th day of

October, 1944, directing the payment to Security-First National Bank of Los Angeles of interest due and owing said Bank in the sum of \$5,534.11, Messrs. Bailie, Turner & Lake appearing as counsel for the Trustee in Bankruptcy, W. C. Shelton, Esq. appearing as counsel for the Security-First National Bank of Los Angeles, and Eugene Harpole, Esq., appearing as counsel for the United States of America; and the Court having considered said Petition, the Referee's Certificate on Review, the Memoranda of Points and Authorities on file, the argument of counsel and the matter having been submitted for decision, and being fully advised in the premises, the court finds:

Findings of Fact [24]

I.

That on January 12, 1937, the above-named corporation was adjudicated a bankrupt and proceedings in relation to said bankrupt estate were duly referred to the Honorable Ernest R. Utley, as Referee in Bankruptcy.

II.

That on March 18, 1937, H. F. Metcalf was duly appointed Trustee in Bankruptcy of said bankrupt estate, thereafter qualified as such Trustee, ever since has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy of said estate.

III.

That at the time of the adjudication in bankruptcy herein the Security-First National Bank of Los Angeles held the record legal title to approximately 90% of the real properties of this bankrupt estate, as Trustee under its Trust No. D-7224, and as security for an indebtedness owing said Bank by said bankrupt corporation in excess of \$1,350,000.00. The whole of said indebtedness at the date of said adjudication having been long past due.

IV.

That the Trustee in Bankruptcy, the bankrupt corporation, and said Security-First National Bank of Los Angeles made and entered into an agreement in writing dated January 12, 1937, which agreement, together with a supplement and certain modifications thereof, were duly approved by this Court and the United States Circuit Court of Appeals for the Ninth Circuit.

V.

That said Agreement, among other things, provided that the indebtedness owing said Bank should be paid in installments as follows:

\$35,000 on or before March 7, 1938;

\$65,000 on or before September 7, 1938;

\$250,000 on or before September 7, 1939;

\$150,000 on or before March 7, 1940. [25]

and the remainder on or before September 7, 1940.

It was further provided by said agreement, as supplemented and modified, that interest should be paid on the unpaid principal of said indebtedness at the rate of 4% per annum, payable quarterly on March 7th, June 7th, September 7th and December 7th of each year, and

"The first installment of said interest thereon shall be paid on or before March 7, 1938. Thereafter said interest shall be paid quarterly from March 7, 1938. If any installment of interest be not so paid, it shall bear like interest as the principal."

Said agreement further provides that:

VI.

"So long as all of the terms and conditions of this agreement are complied with by the other parties here-

to, the Bank agrees not to foreclose the security held for the payment of said indebtedness.

"It is distinctly understood and agreed, however, that should any installment of principal or interest be not paid as herein provided, or any taxes or assessments, be not paid ten days prior to the delinquency thereof, or any of the terms and conditions of this agreement and the Declaration of Trust, herein referred to, be not complied with in the manner and at the times herein, and in said Declaration of Trust provided, that the Bank, except as otherwise provided for herein, may at its option call immediately due and payable the entire amount of the indebtedness then owing by the Bankrupt, or the Bankrupt Estate, and may immediately foreclose the security held by it, by such procedure as is provided for in said Declaration of Trust, or may foreclose the same by an action in court; provided, however, that the Bank expressly waives the right to foreclose the beneficial interest in said Trust as a pledge, as provided for in said Declaration of Trust, and also waives the provision of said [26] trust contained on page 12 commencing in line 23 with the word 'or' and up to and including the word 'code' in line 27. Notwithstanding anything to the contrary herein contained, it is agreed that the Bankrupt, or the Trustee in Bankruptcy shall have sixty (60) days after written notice within which to remedy any default for which notice has been given, before the Bank shall have the right to accelerate deferred payments of said indebtedness, and commence foreclosure of said security. The said sixty day notice herein provided for, shall be deemed the sixty day notice provided for in said declaration of Trust.

"Waiver of Statute of Limitations.

"In consideration of the execution of this agreement, the Bankrupt, the Receiver and the Trustee, when appointed, qualified, and upon becoming a party hereto, expressly waive the provisions of any statute limiting the time when any action may be brought by the Bank on the indebtedness hereinabove referred to, or hereinafter incurred pursuant to the terms of this agreement and/or the Trust herein referred to.

"Waiver of Defenses in Foreclosure.

"It is understood that one of the principal considerations moving to the Bank in this agreement is the willingness of the other parties hereto to waive any and all defenses they may claim to have to the foreclosure of the security held by the Bank, other than as to the correct amount claimed to be due the Bank. It is, therefore, expressly agreed that, provided the debt be then due, as provided for herein, in any foreclosure proceeding brought pursuant to the terms of said Declaration of Trust, and/or this agreement, no defense thereto will be made, other than to determine the correct amount remaining due and [27] unpaid from the Bankrupt to the Bank, at the time of said foreclosure. And it is expressly agreed that the parties hereto will not seek to enjoin or delay such foreclosure, if and when brought by the Bank."

VII.

That subsequent to the making of said agreement of January 12, 1937, a certain oil and gas lease was made and entered into by the Trustee in Bankruptcy, the Security-First National Bank of Los Angeles, and the Bankrupt, as Lessors, and the Universal Consolidated Oil Company, as Lessee, under and pursuant to the terms and

provisions of which certain property of the Bankrupt, title to which was held by Security-First National Bank of Los Angeles, as heretofore set forth, was leased to said Lessee for the production of oil and gas; that thereafter said Lessee discovered oil upon said premises and has been producing oil and gas therefrom and paying to the Trustee in Bankruptcy herein royalties on account thereof.

VIII.

That the agreement of January 12, 1937, hereinabove mentioned provided, among other things, as follows:

"All income from oil, in the nature of bonuses, rentals and royalties from any of the properties held by the Bank in trust, so paid to the Bank, shall be placed in a Special Oil Account.

"The funds in said account shall be available to the Trustee in Bankruptcy for the purpose of making up any deficiency in the 'Special Fund' to pay interest, taxes, assessments and expenses * * *"

By certain modifications to said agreement, it was provided that the payment on account of oil royalties and bonuses instead of being made direct to the Bank should be made to the Trustee in Bankruptcy and by him deposited in a special account, carried in his name at the Head [28] Office of said Bank, all subject to the following provisions of said agreement, to wit:

"While the said Declaration of Trust No. D 7224 and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring

that all bankruptcy funds be accounted for by the Trustee and be disbursed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D 7224 and the agreement of January 12, 1937, as modified hereby.

"Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds or moneys so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust shall, until the indebtedness due the Bank has been paid and except as hereinafter provided, be, while in his possession, impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and such funds or moneys shall be deposited by the [29] Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate."

IX.

Pursuant to the provisions of said agreement of January 12, 1937, as so supplemented and modified, a special

account was opened in the name of the Trustee in Bankruptcy at the Head Office of said Bank and from time to time thereafter said Trustee deposited in said Special Account oil and gas royalties and bonuses received from the Universal Consolidated Oil Company under the terms of the oil and gas lease hereinbefore mentioned, and from time to time thereafter and pursuant to the order and direction of the Court the Trustee paid out of said Special Account interest owing and payable to the Security-First National Bank of Los Angeles and real property taxes assessed against the properties by the City of Long Beach, City of Los Angeles, County of Los Angeles, and State of California.

X.

That subsequent to the year 1939, the Collector of Internal Revenue at Los Angeles, California, filed with the Referee in Bankruptcy for and on behalf of the United States of America a claim in [30] the sum of \$19,363.65 as and for alleged income taxes claimed to be due and owing the United States by the Trustee in Bankruptcy for the years 1938 and 1939. That objections thereto were filed by the Trustee in Bankruptcy and the Claim of the United States was denied by the Referee in Bankruptcy and the order of the Referee in Bankruptcy was duly affirmed by the Honorable Paul J. McCormick, Judge of the above-entitled Court. That thereafter an appeal was taken to the Circuit Court of Appeals, Ninth Circuit, and the order of the Referee was reversed and the Trustee was directed to pay said income taxes.

XI.

That thereafter a petition was filed by the United States of America with the Referee in Bankruptcy and an order to show cause issued thereon, directing the Trustee and

the Security-First National Bank of Los Angeles to show cause, if any they had, why an order should not be made directing the Trustee to pay said income taxes out of said Special Account hereinbefore mentioned; that objections thereto were filed by the Security-First National Bank of Los Angeles who asserted that it had a first and prior lien and claim to said funds under the provisions of said agreement of January 12, 1937 and the terms of its said Trust. That thereafter an order was made by said Referee in Bankruptcy, directing said Trustee to pay said income taxes out of said special account and said order was affirmed by the Honorable Paul J. McCormick. That there is now pending before the Ninth Circuit Court of Appeals an appeal from said order, and said appeal has not yet been heard and determined.

XII.

That additional claims have been filed by the United States of America, through the Collector of Internal Revenue at Los Angeles for asserted income taxes claimed to be owing by the Trustee in Bankruptcy for the years 1940, 1941 and 1942, aggregating in all, with interest, approximately \$40,113.98. That the Court has not heard or considered said claims and no order approving the same has been made [31] in these proceedings.

XIII.

That on September 7, 1944, there became due and payable under the terms of the agreement of January 12, 1937, interest to the Security-First National Bank of Los Angeles in the sum of \$5,534.11, and a petition was filed by the Trustee in Bankruptcy with the referee in Bankruptcy requesting instructions as to whether or not said interest should be paid out of the Special Account hereinbefore mentioned. That an order to show cause was

issued thereon, directed to the United States of America, Harry C. Westover, as Collector of Internal Revenue, and Security-First National Bank of Los Angeles, requesting them and each of them to show cause, if any they had, why an order should not be made and signed authorizing and directing the Trustee in Bankruptcy to pay said interest out of said Special Oil Account. Upon a hearing had before the Referee thereon, an order was made on October 17, 1944, directing the Trustee to pay out of said Special Account on account of said interest the sum of \$5,264.00, the Bank having in its possession other funds in the amount of \$270.11 which could be applied on said interest.

XIV.

That at the time said order was made directing the payment of said interest there was on deposit in said Special Account the sum of \$37,256.23, and at the time of the hearing of the petition on review herein in this Court, there was on deposit in said account approximately \$56,000.00.

XV.

The Trustee is receiving on account of said oil and gas royalties, and depositing in said Special Account, from \$4,000.00 to \$5,000.00 a month. From the Findings of Fact the Court concludes:

Conclusions of Law [32]

I.

That the obligation of the Trustee in Bankruptcy to pay, out of the funds of this bankrupt estate, interest on the secured indebtedness of said Security-First National Bank of Los Angeles was one undertaken by and with the approval of the Court and in order to secure time

within which to liquidate the properties held under the Trust of said Bank and as part of the consideration to said Bank to forgo the right to immediate payment of its entire indebtedness. That said obligation to pay said interest is a part of the cost of administering this estate.

II.

That under the terms of the agreement of January 12, 1937, as supplemented and modified, payment of said interest may be made out of the funds in the Trustee's Special Account carried at the Head Office of said Bank.

III.

That failure to pay said interest when due would jeopardize this entire estate, for if, by reason of the failure to pay said interest, the Court should grant leave to the Bank to foreclose then this property would be lost to this estate.

IV.

That the payment of said interest to said Bank will not jeopardize or prejudice the United States, as there is on deposit in said Special Account more than sufficient funds to pay said interest and the allowed claims of the United States.

V.

That the payment of interest owing said Bank is for the benefit of the estate and will benefit the United States of America in that it is necessary in order to preserve for said estate the property and the oil and gas income from said royalties.

Order [33]

Now, Therefore, Good Cause Appearing, It Is Ordered:

That the order of the Referee in Bankruptcy, dated October 17, 1944, directing payment of interest to Security-First National Bank of Los Angeles be, and the same is hereby confirmed and approved.

Dated this 9th day of April, 1945.

CLAUDE McCOLLOCH
District Judge.

Approved as to Form:

W. C. SHELTON

Attorney for Security-First National Bank of
Los Angeles

CHARLES H. CARR E. H.

United States Attorney

EUGENE HARPOLE

Special Attorney

Attorney for United States of America.

Judgment entered Apr. 13, 1945. Docketed Apr. 13, 1945, C. O. Book 32, Page 52, Edmund L. Smith, Clerk, by E. N. Frankenberger, Deputy.

Notation made in Bankruptcy Docket on April 13, 1945, pursuant to Rule 79(a), Civil Rules of Procedure. E. N. Frankenberger, Deputy Clerk.

[Endorsed]: Filed Apr. 13, 1945. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, claimant in the above entitled bankruptcy proceeding, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Southern District of California dated April 9, 1945, confirming and approving the Order of Ernest R. Utley, Referee in Bankruptcy, of October 17, 1944, authorizing payment of interest to Security-First National Bank of Los Angeles out of the Trustee's Special Oil Account. The Order hereby appealed from was made and entered in this action through the Honorable Claude McColloch, acting Judge of the above entitled Court on the 9th day of April, 1945.

Dated: this 20th day of April, 1945.

CHARLES H. CARR,
United States Attorney

E. H. MITCHELL,
Asst. United States Attorney

GEORGE M. BRYANT,
Asst. United States Attorney

EUGENE HARPOLE,
Special Attorney,
Bureau of Internal Revenue

By Eugene Harpole
Attorneys for the United States of America,
Appellant.

[Endorsed]: Filed & Mailed Copies to Allen T. Lynch
and W. C. Shelton, Attys. for Appellees May 2, 1945. [35]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT, UNITED STATES OF AMERICA, INTENDS TO RELY ON APPEAL

The Appellant, United States of America, designates the following points upon which it intends to rely in its appeal from the Orders of the District Court made and entered in the above entitled proceeding on March 6, 1945 and April 9, 1945, confirming and approving the Referee's Order of October 17, 1944, which directed a payment of interest to Security-First National Bank of Los Angeles by the trustee:

I.

The Referee in Bankruptcy erred in ordering and directing the Trustee in Bankruptcy to pay or permit to be paid the sum of \$5,534.11 or any other sum whatsoever to the Security-First National Bank of Los Angeles to apply upon interest due and owing said bank upon a debt of the bankrupt, before the income taxes due the United States from the bankrupt estate and its Trustee as such, for 1938, 1939 and subsequent taxable years in amounts shown by the petition upon which said order was based, to presently exceed the sum of \$65,000.00 have been paid in full. [36]

Dated: this 26th day of April, 1945.

CHARLES H. CARR.

United States Attorney

E. H. MITCHELL

Asst. United States Attorney

GEORGE M. BRYANT.

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

Attorneys for Appellant.

Received copy of the within Statement this 27 day of April, 1945. Bailie, Turner & Lake, *Attorney for H. F. Metcalf, Trustee.*

May 3rd, 1945 Rec'd. copy. W. C. Shelton & Geo. W. Burch, Jr., by W. C. Shelton, Attys. for Security-First National Bank of Los Angeles.

[Endorsed]: Filed May 7, 1945. [37]

[Title of District Court and Cause.]

DESIGNATION AND STIPULATION OF
CONTENTS OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the Southern District of California, Central Division:

The Appellant, United States of America, a claimant in the above entitled proceeding, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on its appeal from the Orders entered in the above entitled proceeding on March 6, 1945 and April 9, 1945, by the District Judge, confirming and approving the Referee's Order of October 17, 1944, which directed a payment of interest to the Security-First National Bank of Los Angeles by the Trustee in the above entitled proceeding.

1. Minute Order of March 6, 1945;
2. Notice of Appeal from Minute Order of March 6, 1945;

3. Order of April 9, 1945;
4. Notice of Appeal from Order of April 9, 1945;
5. Referee's Certificate on Review dated February 10, 1945;
6. Petition for Review of Referee's Order of October 17, 1944;
7. Referee's Order of October 17, 1944; [38]
8. Referee's Order to Show Cause of September 13, 1944;
9. Trustee's Petition of September 12, 1944;
10. Reporter's Transcript of Proceedings of October 5, 1944;
11. Contents of Record on Appeal taken by Security-First National Bank of Los Angeles from the Order of the above entitled Court entered in this proceeding on February 6, 1945, which confirmed the Referee's Order of June 6, 1944; (by reference)
12. Appellant's Statement of Points upon which it intends to rely upon Appeal;
13. Clerk's Certificate;
14. This Designation of Contents of Record on Appeal and the appended Stipulation of Approval.
15. Reporter's Transcript of proceedings had before Hon. Claude McColloch on February 26, 1945.

Dated: this 2nd day of May, 1945.

CHARLES H. CARR,

United States Attorney

E. H. MITCHELL,

Asst. United States Attorney

GEORGE M. BRYANT,

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney,

Bureau of Internal Revenue

Attorneys for Appellant. [39]

It is hereby stipulated and agreed by and between counsel for the Appellant and the Appellees that the foregoing designated parts of the record shall constitute the record in the appeal of the United States of America from the Orders entered in the above entitled proceeding on March 6, 1945 and April 9, 1945, by the District Judge, confirming and approving the Referee's Order of October 17, 1944, which directed a payment of interest to Security-First National Bank of Los Angeles by the Trustee.

Dated: this 2nd day of May, 1945.

CHARLES H. CARR,

United States Attorney

E. H. MITCHELL,

Asst. United States Attorney

GEORGE M. BRYANT,

Asst. United States Attorney

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue

Attorneys for Appellant.

W. C. SHELTON and

GEORGE W. BURCH, JR.,

By W. C. Shelton

Attorneys for Appellee, Security-First National
Bank of Los Angeles.

BAILIE, TURNER & LAKE

By Allen T. Lynch

Attorneys for Appellee, Trustee in Bankruptcy.

[Endorsed]: Filed May 7, 1945. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 40 inclusive contain full, true and correct copies of Referee's Certificate on Review; Petition for Authority to Pay Interest to Security-First National Bank of Los Angeles out of Trustee's Special Oil Account and for Order to Show Cause; Order to Show Cause re Payment of Interest Due Security-First National Bank of Los Angeles; Order Authorizing Payment of Interest to Security-First National Bank of Los Angeles out of Trustee's Special Oil Account; Petition for Review of Referee's Order of October 17, 1944; Minute Order Entered March 6, 1945; Notice of Appeal; Minute Order Entered April 14, 1945; Findings of Fact, Conclusions of Law and Order re Referee's Order of October 17, 1944, Directing Payment of Interest to Security-First National Bank of Los Angeles; Notice of Appeal; Statement of Points Upon Which Appellant, United States of America, Intends to Rely on Appeal; and Designation and Stipulation of Contents of Record on Appeal, which, together with copy of Reporter's Transcripts of Hearings October 5, 1944 and February 26, 1945, transmitted herewith, and together with Transcript of Record on the Appeal of Security-First National Bank of Los Angeles being No. 11051 in the United States Circuit Court of Appeals for the Ninth Circuit constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court
this 11 day of May, 1945.

[Seal]

EDMUND L. SMITH,

Clerk,

By Theodore Hocke
Chief Deputy Clerk.

[Title of District Court and Cause.]

Before Hon. Ernest R. Utley—Referee

REPORTER'S TRANSCRIPT OF PROCEEDINGS
IN RE: ORDER TO SHOW CAUSE, TRUSTEE
VERSUS UNITED STATES OF AMERICA
AND SECURITY-FIRST NATIONAL BANK
OF LOS ANGELES

Los Angeles, California, Thursday, October 5, 1944.

10:00 o'clock A. M. Session.

The Referee: F. P. Newport.

Mr. Lynch: Ready. This question presents a tax problem. A petition for order to show cause and order to show cause has been directed to the Security-First National Bank and the United States Government and we request the Court's instructions as to whether or not the interest that is due the Security-First National Bank or was due the Security-First National Bank on September 7 amounting to \$5,534.11 should be paid out of the impounded oil funds. The bank has received, as I set up in the exhibit attached to the petition, \$229.64 from the sources indicated therein which is available to apply on that interest. Then the balance of the amount necessary

to pay the interest would have to come out of the oil fund.

The Referee: How much is on hand now in the oil fund?

Mr. Lynch: We have as of the date of the filing of this petition \$37,256.23. Since that time we have received a check from the royalties of approximately \$5200 so there is at the present time approximately \$43,500 in that account.

The Referee: The allowed claim of the government is how much?

Mr. Lynch: The allowed claim with the interest is [2*] approximately \$25,311.60. Now, in addition to that there is on file an additional claim which after crediting the amount that the government has allowed for the year 1942 as an over-assessment amounts to \$35,040.82 and interest on that will bring it up to approximately \$40,113.90 so that we have a total of approximately \$65,000 without taking into consideration the year 1943 and the year 1944, the current year. For 1943 the present indication is that we will have a substantial tax but assuming, without in anywise conceding we are liable for tax on the question of a sale of real property then our tax for the current year 1944 will be substantially, or approximately, \$30,000 so at the present time we face the possibility we will have \$100,000 in round figures of taxes to pay.

The Referee: What is the oil check per month now?

Mr. Lynch: This month, for the month of September, I think it is around between fifty-two and fifty-three hundred dollars.

*Page number appearing at top of Reporter's Transcript.

The Referee: What is the amount of interest to be paid now?

Mr. Lynch: \$5,534.11. There is \$229.64 collected from oil lands.

The Referee: Well, in order to reserve the amount necessary to take care of the tax claims of some \$25,000 and pay interest it would still leave about \$10,000 in the oil fund? [3]

Mr. Lynch: Yes.

The Referee: And then the monthly receipts are about \$5,000 a month?

Mr. Lynch: Yes, but the Court must take into consideration that so far as we are personally concerned we have been allowed all of the credit we are entitled to be allowed for the tax years 1940, 1941 and 1942. In other words, it can be probably safely assumed we have a tax liability for those years of \$40,000.

Mr. Harpole: If the Court please, it seems to me—and I have not had a response from Washington and this is simply my own views—that the tax matter is not in too healthy a position. Here is a corporation,—it is really the Trustee in Bankruptcy that owes the United States here and now sixty-five or sixty-six thousand dollars and some odd in taxes and probably owes another \$30,000 from the end of 1944, or roughly, \$100,000. Against that he has \$37,256 in reserve or the oil or the sinking fund and I do not acquiesce in the view that the United States is confined to the oil fund for the collection of its taxes; however, it is not necessary to have a controversy on that now but these are expenses of administration and not claims in the sense they were debts due when bankruptcy accrued. Taxes have accrued because of a successful and profitable operation of the property by the Trustee in Bankruptcy and with the consent of the principal creditor.

I think that the [4] government interests are jeopardized by continuing to pay interest which after all is a debt that ought to be subordinated to expenses of administration.

Mr. Lynch: No. I think we ought to understand one another on that right here. This is current interest and in any event would be expenses of administration and entitled to the same status of priority that the government claim has. The government claim has no greater sanctity than this claim for current interest.

Mr. Harpole: Well, I am not too well informed on that but the best that would give would be a prorata on the interest. Perhaps it is not good for the estate either to let these taxes go. As I recall, there is a considerable penalty runs on a tax that is not paid after it is due. That can be avoided by paying it.

Mr. Lynch: We would be delighted to pay it if we could just get the bank to say it should be paid.

Mr. Harpole: I think when there is only \$37,000 in sight against a probable \$100,000 liability that the bank ought not to be receiving its interest payment in full and no payment being made on the tax, but that the fund should at least be accumulated until we know as a matter of law how the bank comes out in this case.

The Referee: Of course, on the allowed claim the Court has impounded sufficient money to take care of that. Do you contemplate filing objections on the other claims? [5]

Mr. Lynch: Not on the 1940, '41 and '42 taxes. I think I have indicated heretofore we have found ourselves in somewhat of a peculiar situation with reference to determining what should be done on these taxes. If we are not liable for a tax on a sale, a gain on a sale then certainly we are not entitled to any credit for any loss on the sale. We cannot take the benefit of a loss on a

sale and at the same time say we are not liable for any taxes on a gain. It is either whole hog or none. If we are not liable we are not entitled to any credit. As far as we have been able to figure out so far on the 1940, '41 and '42 taxes if we take the position we are not liable for the gains then we would lose the benefit of the losses, and the loss for those sales that have been for less than the cost would more than offset the gain so at the moment we do not see that we are in any position to file any objection to taxes for those particular years, but that brings up the question whether or not we are going to be estopped if we do not have substantial gains that appear to be facing us for the year 1944, so we have to go back and review the whole history of all the taxes for all the years to determine how we are going to come out and whether it will profit us to take one horn of this dilemma or the other.

The Referee: This is certain. The bank is now reviewing the Court's order directing this claim for taxes in the sum [6] of some \$25,000 plus to be paid.

Mr. Lynch: Yes.

The Referee: The Security-First National Bank is reviewing from that order. Incidentally, Mr. Harpole, I tried to get you day before yesterday to look over a copy of the proposed certificate of review which is in the office, and if you will call for the copy you can see if there is any additional information you want in there. I think it covers everything but you better see it before it is filed. Miss Morris will give you a copy, and you can tell her I said to do so.

Here is the situation: The Court has held and the evidence clearly shows that the oil property and the land on which the oil wells are located is easily worth in excess of a half a million dollars. I do not think the gov-

ernment's claim is going to be jeopardized because certainly if they can take the money from the oil to pay taxes they can take money derived from the sale of the oil lands and properties to pay them. If my decision is sustained I think the government is secured in that respect and the Court can see little need of holding money to pay for the government claim when it is apparent the bank is going to review it, and has reviewed one already, so I think we better pay this interest and get that behind us, and I think everybody is amply protected by the value of the oil property on the tax situation and I think the money will be [7] available to pay the taxes as soon as they are definitely determined. I do not think there is any question about that. If I felt otherwise I would be reluctant to pay this interest but I do not believe there will be any trouble.

Mr. Lynch: Of course, it should be brought out, too, so the record will be clear, we do not get any interest on this fund we have on deposit.

The Referee: That is right. Undoubtedly the question which is now pending on review will probably go to the Supreme Court and there will be considerable time before any money can be used for taxes, and in the meantime the oil fund will be accumulating.

Mr. Harpole: That is true but while the oil fund is accumulating the taxes are accumulating. I don't know what bracket they are in, but I would suppose half of the income from that oil would be written off for current taxes.

Mr. Lynch: No, it is not quite that high but it is pretty high.

The Referee: There is a lot of oil there yet and the property alone—the bank itself valued the property alone outside of the oil interests at over \$200,000. That is the

bank's figure alone when they were trying to get a right to foreclose, so I think we will have plenty of money there to take care of it.

Mr. Harpole: There have been a good many oil reserve cases tried in the courts and sometimes the estimates prove [8] out and sometimes they do not but it is almost invariably true as years go by less and less oil can be taken from the wells.

The Referee: But the land alone for harbor purposes is worth considerably over \$200,000.

Mr. Lynch: And this is true, one of the cases where estimates of the oil income were made by Mr. Carey when this field was first opened up was actually below what has been produced.

The Referee: I feel that everybody is going to be protected there and there is no use of letting the money lay in the bank. If necessary the Court could bring on a sale of the oil properties and oil lands and certainly it will bring more than enough to pay any tax claim.

Mr. Harpole: The tax claims themselves draw interest at six per cent.

The Referee: I know.

Mr. Lynch: May it be stipulated—

The Referee: I think I will grant the petition.

Mr. Lynch: May it be stipulated, Mr. Harpole, if Mr. Metcalf were called he would testify in accordance with the petition? There has been no answer filed so I assume you would stipulate?

Mr. Harpole: It is a verified petition?

Mr. Lynch: Yes.

Mr. Harpole: I will stipulate Mr. Metcalf would testify [9] as he set out in the petition, without waiving any objections that some of the things set out are conclusions of law and not statements of fact.

The Referee: You also concede if he was here he would testify as related by Mr. Lynch as to the additional accumulations in the fund since the petition was filed?

Mr. Lynch: In other words, there is about \$5200 more than has been received from the oil royalties since this petition was filed.

Mr. Harpole: I would so stipulate.

Mr. Lynch: And it is referred to as being the approximate amount in the petition.

The Referee: Very well. You may draw the order as indicated.

Mr. Lynch: Yes, your Honor, thank you. [10]

In the District Court of the United States
Southern District of California
Central Division

Before Hon. Ernest R. Utley—Referee.

State of California
County of Los Angeles—ss.

I, C. N. Olson, official reporter of the above-entitled court, do hereby certify that the foregoing pages 1 to 10, both inclusive, comprise a full, true and correct transcript of the proceedings in re: Order to Show Cause, Trustee versus United States of America and Security-First National Bank of Los Angeles of October 5, 1944.

Dated this 6th day of February, 1945.

C. N. OLSON
Official Reporter

[Endorsed]: Filed Feb. 6, 1945 at 30 min. past 2 o'clock P. M. Ernest R. Utley, Referee. B. Clerk.

[Endorsed]: Filed Feb. 10, 1945. [11]

[Title of District Court and Cause.]

Before the Honorable Claude McColloch

REPORTER'S TRANSCRIPT OF PROCEEDINGS
ON HEARING OF PETITION FOR REVIEW
OF REFEREE'S ORDER OF OCTOBER 17,
1944 [1]

Los Angeles, California, Monday, February 26, 1945.
2:30 P. M.

Mr. Harpole: I assume that your Honor has had an opportunity to examine the order?

The Court: I have looked through the file, but I can't say I understand it.

Mr. Harpole: That perhaps is not strange for the reason that there have been, you might say, other chapters to this same litigation that somewhat tie in. We just came from Judge McCormick's court room, where the matter of fixing a bond on appeal from an order directing payment of the 1938-1939 income taxes was taken up. The income taxes for this year have been adjudicated. The Ninth Circuit has allowed them, and they have been held to be an expense of administration by the District Court, in the petition that was brought subsequent to the action of the Ninth Circuit Court for an order directing the Trustee to pay the taxes that had not been paid.

After that had occurred, the Trustee in Bankruptcy asked leave to pay certain interest to the Security-First National Bank, and that's the substance of the petition from which this review came. In the proceeding he mentioned not only the fact that certain taxes had been adjudicated, but the record bears out that the government

had a claim for income taxes for the same years subsequent to 1939, in the amount of about \$35,000. That claim had neither been [2] objected to nor actually allowed. It was simply a claim on file. The tax, if it were due, was income tax arising from the profitable operation of the business or property of the bankrupt by the Trustee,—money made in the course of bankruptcy.

In addition to that the Trustee was aware of some negotiations that he had had for years, that were not then under assessment, bringing the respective taxes and interest unpaid up to about \$100,000, all of it covering the years in which the property or business of the bankrupt was operated by the Trustee.

At the time the petition was filed the bankrupt owed the First National Bank a great deal of money on a secured loan, and interest was running on the unpaid balance of that loan. The Trustee sought, and was granted permission to pay about \$5,000 interest—between five and six thousand dollars; the exact amount of which appears in the record. There was about \$40,000 or \$45,000 of money in the estate at that time, and there was a great deal of real property, most of it encumbered.

The review was filed to the referee's order, directing the payment of \$5,000 interest, and the reason for the review, as set forth in the memorandum, was that these income taxes are an expense of administration, and it is the position of the government that the interest upon any secured debt is still only a debt; it is an accretion to the debt, [3] and consequently, under the provisions of the Bankruptcy Act, particularly found in 11 U. S. Code, 104 (a) (b), those taxes should be paid before the debts of the bankrupt are paid. The alternative might be, if the bank succeeded in establishing that the \$5,000 was an

expense of administration rather than a part of the original debt, then a prorated payment should be made; the bank's \$5,000 ought to stand against the total of the tax due to the government on the ratio of about 5 to 100, on a prorated basis.

That is the reason of the review, and I think I have nothing to add to what has been cited in the memorandum of points and authorities.

The Court: I will ask some questions after I have heard everybody.

Mr. Lynch: I think possibly in view of the court's observation it might be helpful if we gave a little more of the factual background.

The background and history of the case, as Mr. Harpole has given it, has not been entirely factually correct. The record will disclose, and I may say the contract I am about to refer to is a part of the record in this proceeding by reference—the record discloses that prior to January 12, 1937, the F. P. Newport Corporation was indebted to the Security-First National Bank in excess of \$1,300,000. That indebtedness was secured by a trust through the Security-First National Bank, under the terms and provisions of which [4] the bank held the record legal title to approximately 90 per cent of all the property of this corporation, as security for that particular indebtedness. Prior to January 12, 1937, the bank had instituted foreclosure proceedings. Upon the filing of the petition in bankruptcy in this case the bank was restrained from proceeding with these foreclosure proceedings and, after considerable discussion and negotiations between the interested parties, we made a contract between the bank, the bankrupt corporation, and the Trustee in Bankruptcy,

and that is the contract that has been referred to as the contract of January 12, 1937.

Under this contract the fact that the bank held this property as security for this indebtedness was recognized. It was agreed that that indebtedness was a certain stipulated amount, and the contract provided that the Trustee in Bankruptcy should pay interest on that indebtedness at the rate of four per cent per annum, the interest to be paid quarterly. It also provided, in the performance of the obligations undertaken by the contract, in addition to paying the indebtedness, the entire indebtedness was to be paid in instalments over a period of years, and if there was default in the payment of that indebtedness the bank might then go ahead and foreclose, and no defense would be made to an application on their part to foreclose, after the expiration of 60 days' notice.

An appeal was taken from the order approving the [5] contract, by certain creditors. It went to the Circuit Court of Appeals, and was approved. A petition for certiorari was filed with the Supreme Court, and denied. So that contract has the blessing of this court and the Appellate Court for the Ninth Circuit.

So one of the direct obligations undertaken by the Trustee, pursuant to the approval of the Bankruptcy Court, was that he should pay the Security-First National Bank interest at four per cent on the unpaid principal, that payment to be made quarterly. That was one of the things that motivated the bank to enter into the contract—the realization that they would get their interest paid during the period this property was being held by the Trustee, and eventually liquidated. In other words, the motivating cause of this contract was the belief of the bankrupt and the creditors, if they were given time, this property could

be liquidated for sufficient to pay not only the bank but also the secured creditors, in an amount of some \$200,000.

A fortunate thing occurred; we struck oil on part of this property, a nine-acre tract; we have six oil wells. Those wells are now producing approximately between \$5,000 and \$6,000 a month royalties net to the estate. The contract which was entered into between the bank, which I referred to, the contract of January 12, in addition to other things, provided that the revenue from the oil wells should be placed in a special account, and that money so deposited [6] was to be available to the Trustee for the purpose of paying taxes, interest on the indebtedness, and other expenses therein itemized.

The bank has always insisted that the funds from this account were subject to the trust originally, and by the terms of the contract made subject to the lien of the bank, and as security for the payment of their indebtedness. The government took the position that its income tax, which was the tax resulting from the production of this oil, was an expense of administration, and that they were entitled to have their income tax paid out of that oil fund, out of the oil royalties which we have deposited in a special account. The court determined that the government was correct in that conclusion, and there is now on appeal to the District Court of Appeal the question of whether or not the determination of this court is correct in that regard.

The Court: You are appealing?

Mr. Lynch: No, the bank is appealing from the order, contending that they have a prior lien on all of these funds and that they cannot be used for the purpose of paying taxes. There is a provision, incidentally, in the contract that expenses of administration are not to be paid out of

these funds. However, the bank did, by the contract, expressly provide that interest on the obligation to the bank could be paid out of these funds.

It is the position of the Trustee in Bankruptcy that the [7] interest accruing on this debt subsequent to adjudication is an expense of administration. The contract to pay this interest is the contract of the Trustee in Bankruptcy made by and with the approval of the Bankruptcy Court. Therefore, it is an expense of administration. It is, in our opinion, certainly every bit as much an expense of administration as the income tax assessed by the government.

There was an obligation entered into in good faith, with the approval of the Bankruptcy Court, so we feel it definitely is an expense of administration. The only taxes that have been adjudicated, that is, the only income taxes that have been adjudicated in this case as being expenses of administration and entitled to be paid out of these funds, are taxes for 1938-1939, which in principal amount to a little over \$19,000, and with accumulated accrued interest, approximately \$25,000. It is true there is in the offing additional taxes, but they have not yet been passed on and determined by the court to be expenses of administration.

The Court: Why not?

Mr. Lynch: The matter has just never been presented, is about the only answer I can make to that.

We don't believe, I will say very frankly, that the estate has any objection to approximately \$35,000 of additional taxes, but still that question has not yet been determined, and the Bankruptcy Act provides expenses of administration can only be allowed by the court, must be approved by [8] the court, and that has not been done, in addition to the income taxes of \$25,000. Right now in

this special oil fund we have in the First National Bank—I am going outside of the record when I say there is approximately \$56,000.

Mr. Harpole: I don't believe you are. I think the record shows that.

Mr. Lynch: There is right now approximately \$56,000 in that account. At the time that this was heard there was \$46,000, and additional income has been received, amounting to approximately \$5,000 a month income, less the real property taxes which have been paid, so that fund is steadily growing. We have enough on hand to pay this allowed and determined claim of the government of \$19,000 plus interest, and if it is subsequently adjudicated to be payable—in other words, there is an appeal from that right now, and there is enough to pay that and pay the interest to the Security-First National Bank.

So it is our position that we should go ahead and pay it; that the Referee may be given an order directing him to pay it. I would think that order justified, because we think it is an item of expense. There are enough funds on hand to pay that and to pay this \$25,000, if it is ultimately determined the government is entitled to receive it, and give us something more. By the time this order is passed on we will have additional funds, and as the Referee in Bankruptcy pointed out in the transcript before the court, [9] there is sufficient value to the real properties in this estate to pay off the government, if eventually it is determined the government is entitled to receive payment.

So, in any event, it is our position that the government will not be prejudiced by the payment of this particular item of interest, and if we don't pay it we very frankly face this situation, for the bank to come in this court and say: This contract, which was made with the ap-

proval of the court, provides we are to receive our interest at the rate of four per cent, payable in quarterly instalments; in other words, if it isn't paid we are entitled to foreclose, and no defense will be made to that foreclosure. That is our position, and the whole value of the estate may be lost to everybody—not only the government, but to the creditors, and everybody else.

The Court: You ought to get that interest rate reduced.

Mr. Lynch: We got it reduced from seven to four per cent.

Mr. Shelton: It was first eight; then six, and then four. This matter has been pending, your Honor, since it was put in its present form in 1936.

Mr. Lynch: The bankruptcy proceeding started March, 1935. Actually we paid the bank all but approximately \$450,000 of over \$1,300,000, and we have been paying interest all along until just recently, and the government gets apprehensive [10] all of a sudden that they are not going to get theirs out of it, so they have taken a review of this particular order. But we have been paying it pursuant to the court's order, in instalments, ever since 1937. I will say, frankly, in my opinion the two items are expenses of administration. I am not going to say what my view may be, as to whether the government is entitled to any income tax, but the court so far has held that they are, so, assuming that that is correct, the two items are expenses of administration.

If we had a limited fund, with no possibility of its growing, they would have to be paid pro rata, and a payment of \$5,000 interest would be out of proportion, but, so far as the immediate matters before this court are concerned, we do have enough money to pay this tax, and we have enough money to pay this instalment of in-

terest. Frankly, I think when it comes time to pay the other—when and if the government finally gets an order that they are entitled to it, we will have enough to pay it.

Mr. Shelton: There is very little, your Honor, I can add to what has been said. We feel this fund which we are fighting over is a sequestered fund for the payment of this debt; that is what the contract says, but until the Ninth Circuit has an opportunity of ruling whether the government has a priority over the payment to the bank—until that is ruled on, we can't argue the matter. We are convinced that what the attorney for the Trustee says is correct. I can't [11] imagine how the government is going to suffer by this, because all parties conceded in this proceeding from time to time that the oil properties are producing—I think the estimate of \$5,000 is a little high; I think it is about \$4,500 a month.

Mr. Lynch: I said it was between \$4,000 and \$5,000.

Mr. Shelton: It has a tendency to drop off; not very substantially. This appeal has been taken by them, and I can't see how the United States Government is possibly going to be hurt in the slightest by this payment.

The Court: If I allow the payment Mr. Harpole is going to appeal it.

Mr. Shelton: I don't know. He didn't appeal the other one.

Mr. Harpole: That's true, your Honor; there have been some orders not objected to. It is obvious that more than a half million dollars have been paid to the bank on this debt. The government hasn't been paid anything yet. It was the belief on the part of the people in charge of the estate here until very recently that they did not owe any tax; that a tax could not be collected from them.

Mr. Lynch: We still have that belief.

Mr. Harpole: The Treasury Department at least was not a party to the contract. They did not agree to subordinate themselves to the bank. They had no part in making the agreement of 1937. It was simply accepted by the revenue [12] officers for what it said, and the courts have said, when a trustee in bankruptcy, operating the property of the bankrupt, realizes a gain, he is subject to income tax. That was the holding of the Ninth Circuit. The petitions in this case and the briefs suggest this, that the bank may be on the verge of foreclosing this property. Suppose it is allowed to foreclose and take away the land, and perhaps the money owed for the tax is not paid—I suppose it can't take away all the money at this time, because there was just an order directed in the course of preparation, sequestering enough to pay the adjudicated taxes; the bank gets four per cent interest, and the income tax carries six per cent, so there is a two per cent advantage in favor of the estate if the tax is paid.

The Court: How can a foreclosure be averted if the bank insists on its rights under the contract?

Mr. Harpole: It would have to be denied by the court.

The Court: The unpaid balance of the principal is past due?

Mr. Harpole: It has been for a great while.

Mr. Lynch: When the order was last made enjoining foreclosure until next June, all the interest had been paid currently. There was no unpaid interest then involved. That order expressly provided if there were any change in circumstances it was without prejudice for the bank to come back and renew its application to foreclose. We are [13] apprehensive, if the bank is not paid its interest, it will say: Here is the contract. You agreed we were to get our interest. It is one thing to say we can't realize

our principal right now, but it is another to say we can't have interest due on our money.

Mr. Harpole: This comes down to a very narrow legal point: Must the expenses of administration be paid before the debts due the estate? If that be the case, there has been more than a half a million dollars paid on this debt, and there hasn't been anything paid on income taxes, which are expenses of administration. If they are both expenses of administration, it would seem at least they ought to prorate. One person ought not to receive the administration expense, and another in the same class receive nothing.

The Court: Do I understand there is enough on hand to pay interest, and pay the adjudicated tax claim?

Mr. Harpole: No, there isn't in cash.

Mr. Lynch: Yes, there is, Mr. Harpole. The court asked you about the adjudicated tax.

Mr. Harpole: For the adjudicated tax, yes, there is enough to cover that, but there is another tax of \$35,000 which the reporter's transcript indicates the Trustee is not going to contest, and that is the *prima facie* tax. That is also due, until it is overruled.

The Court: Has a claim been filed?

Mr. Harpole: A claim has been filed. [14]

Mr. Lynch: That isn't true in bankruptcy. That is the ordinary taxpayer's position, that when a claim has been filed there is a presumption of validity of the claim. The Bankruptcy Act expressly provides any expenses of administration must be submitted under oath and passed upon and approved or disapproved by the court. That has never been done with reference to any of this tax, with the exception of this one adjudicated claim. I cite the section of the Bankruptcy Act in my memorandum. I don't remember the section.

Mr. Harpole: That loses sight though of the revenue statutes, I think. There are specific statutes on these taxes, and they say that the Trustee in Bankruptcy—Section 142 of the Internal Revenue Code—shall be subject to all of the laws that apply to individuals, and one of those laws is that tax be paid on notice and demand. The demand has been made and presented in the usual form. It is true the Trustee can object to it, but he has indicated he does not intend to, unless he has changed his mind.

Mr. Shelton: I have heard, however, the attorney for the bankrupt, who takes a pretty active part in all these proceedings, stated he would contest the payment of further income taxes. A great deal of the \$35,000 is predicated on the sale of real estate on a profitable basis, so, irrespective of what the Trustee in Bankruptcy might do, there is a contest coming up on the assessability of the tax [15] against the bankrupt's estate.

I was not in that fight against the levy of the assessment of taxes. I am sympathetic, of course, in the view of the Trustee. I thought his brief covered the subject; but this I do know, since we are talking about what the Ninth Circuit may or may not do, the Ninth Circuit has said in a recent case if the Trustee in Bankruptcy elects to conduct a business on behalf of the bankrupt, any obligation which he assumes in the way of taxes must be paid by him, and not out of the secured creditors. Mr. Harpole speaks about being a creditor. We are no unsecured creditor in this matter. We are in the position of an adjudicated secured holder of the legal title to this property which the Circuit Court of Appeals has held is in the nature of a deed of trust, with a lien expressly impressed upon all rents, issues, profits and royalties. That was the original declaration, and the contract supplement-

ing that, referred to by the attorney of the Trustee in Bankruptcy, says expressly that all of the income from this property is impressed with a lien, and that it shall be segregated from all general funds of the bankrupt estate, and shall be earmarked for the payment of this debt, and shall be held for the purpose of immediately paying off in full the bank,—as clear a sequestration contract, at least in our opinion, as could be drawn. That matter goes on up.

I was thinking about the citation of authorities from [16] the Ninth Circuit. The Trustee in Bankruptcy does not have to go ahead and operate any business. That is his gamble. He can't do it at the expense of a secured creditor.

The Court: Whose brain child was the contract?

Mr. Shelton: Mr. Lynch and I are the parties who drew up the contract.

The Court: Was any reference made to taxes in the contract?

Mr. Shelton: Yes, there was a reference made to taxes, but not quite so broad as my associate has referred to. It referred to the fact that this general fund would be available for taxes which were a charge against the estate and to the trusteeship of the bank. The bank is trustee in that matter. The only taxes assessable against them were on real estate. It was conceded by all parties that was what was incorporated in that contract. It referred to taxes sustained by the trustee of the bank; not the Trustee in Bankruptcy.

The Court: Was the discovery of oil contemplated?

Mr. Shelton: The discovery of oil was contemplated in that the contract provided it should be put in a special fund and earmarked, and payable on this debt in full, except that it should be used in the payment of such taxes

as might be due. At that time, I am very frank to say, I don't think the parties to the contract, who drafted the contract, [17] had any idea that the Trustee in Bankruptcy liquidating an estate of this kind could ever, under the facts of the case, be held to the operation of the property or business of the company. I think it is an unfortunate decision, but it is there.

Mr. Lynch: I would say that determination of the Circuit Court of Appeals that the Trustee had to pay an income tax was a pioneer decision. It is the only decision in the country holding the Trustee liable for the payment of income tax on the production of oil, where that production of oil was carried on through the management of the lease to a third party. In other words, it is the position of the Trustee that the production of the oil was nothing but a liquidation. It has established some law; that is all.

The Court: Were there contrary decisions?

Mr. Lynch: No; it has never been passed on.

The Court: Was certiorari denied?

Mr. Lynch: Yes, certiorari was denied, so we are faced with the proposition that the court has adjudicated that there is an income tax payable, but now the question up on appeal is the question as to whether that income tax could be paid out of these funds that are claimed by the bank. That has not yet been determined by the Circuit Court, this matter now being on appeal, and, of course, if the bank should succeed in its appeal in this matter, and it is determined that income taxes are not payable out of the oil [18] revenue then, of course, the government is going to have to wait along with the rest of the unsecured creditors until the bank is liquidated.

The Court: Are all these questions you gentlemen have discussed covered in the memorandum on file?

Mr. Harpole: The priority payment between the debt and expenses of administration is discussed in the government's memorandum, and that is the only question discussed in our memorandum.

Mr. Lynch: It is discussed in our memorandum, too. I will say frankly we did not go into as much history of this case as I would be inclined to do now because I realize your Honor is not so familiar with it as Judge McCormick, who has lived with this case since 1937 but he seems to be getting a little tired of it.

Mr. Shelton: 1935—he has lived with it 10 years.

Mr. Lynch: Yes. I would be very happy to supplement it, if the court wishes any additional information.

Mr. Shelton: The bank has filed no brief, but adopts the one filed by Mr. Lynch as presenting our position.

The Court: I would like to have Mr. Dewing strike off what has been said. I think there have been some questions discussed here that are not discussed in the memoranda.

Mr. Lynch: The estate and the government I am sure will agree to that.

Mr. Harpole: Yes, I think the court should have a copy [19] of the transcript.

The Court: You are just talking about the 1938 and 1939 taxes?

Mr. Harpole: No, the 1938-1939 taxes have been adjudicated. The non-adjudicated taxes would run, I believe, from 1940 to 1943 inclusive, and possibly some for 1944. Mr. Lynch is more familiar with that than I, because there are some taxes he mentioned in his petition in the hearing before the Referee that had not been reduced to a claim.

The Court: When was oil struck?

Mr. Lynch: In 1938. The government has filed claims for some forty-odd thousand dollars, in addition to the 1938-1939 tax, of which they have admitted there was an erroneous assessment of \$12,000, so it reduces the claim which they have filed to around \$35,000. That includes the years 1940, 1941 and 1942, and no audit has been made for 1943 and 1944. There is a possibility there will be some tax for 1943, but our present belief is there will be none for 1944.

The Court: It looks like, though, this is a kind of situation which will never catch up with itself. You have an income of fifty or sixty thousand dollars a year from the wells, and your interest is \$20,000 a year to the Security-First National, and the suggestion in the brief is that the government claims an interest in half of the oil royalties for taxes. [20]

Mr. Lynch: That is not wholly correct, because even on the basis of the claims that have been filed for 1940, 1941 and 1942, taking into consideration the erroneous assessment they already admit, the tax liability for those years, assuming there is a tax at all, is approximately \$35,000 for the three years, and yet for those three years our oil income was approximately—those years it was greater—the oil income was in excess of \$250,000, for those three years. For 1944, for instance, our income has been something over \$60,000 from the oil, and yet I don't think we will have any tax at all. I will say, in explanation of that, the government has taken the position so far that the Trustee in this particular estate is liable for tax on gain on the sale of real property. Consequently, if the estate gains on the sale of real property, the estate is entitled to a credit for losses for 1944 on the sale of real property to offset the oil income, so apparently they are not going to have any tax.

The Court: It seems to me, deciding this immediate question on the narrow basis—it wouldn't call for a decision on the underlying legal question—I could say, assuming all that Mr. Harpole is urging in view of the financial setup he is not going to be hurt.

Mr. Lynch: That is our position.

The Court: That is one of your positions. Mr. Harpole doesn't want me to do it that way. He doesn't agree with me [21] that a question like this should be decided on that kind of a basis. He says the government—I may be putting words in his mouth, but I have heard ardent representatives like him speak for the government about taxes before, so I am sure I do not exactly say he was thinking the government should ever be put in any jeopardy of its position, and that it should be paid first for what has been immediately adjudicated, and then reserves should be maintained for its possible claims.

That is what I mean when I say, from the government's point of view, accepting the government's point of view in full, the situation never would catch up. With their immediate claims and their fears, which always total more than there is on hand, there would not ever be enough left, if this interest payment were made every year, to make them absolutely sure of their position. He is not going to want me to decide it that way. If I say: Here, Mr. Shelton, you take this \$5,000 until the date of your next quarterly payment. You would have to go to Judge McCormick, and Mr. Harpole would be there urging the same things; and if I put it on that narrow ground I wouldn't be deciding anything except immediate pay-

ment of the \$5,000. If I were to go ahead and hold against Mr. Harpole on his legal position, and hold with Mr. Lynch and Mr. Shelton on their legal position, on your next quarterly payment you would come in and say to Judge McCormick: By comity you have got [22] a decision we ask you to follow. If Mr. Harpole had not appealed the thing would be settled, and this threat of foreclosure would be averted permanently.

That is the practical aspect of this situation which I must first resolve. I could go out, take figures, repeat what I have just said, and probably come back here and do what you immediately want me to do. Whether that is the approach I should make, I want to think about that. As I said a moment ago, Mr. Harpole is going to appeal, regardless of what ground I put it on. The government always does. If I should hold against you, you would have to ask authority, wouldn't you?

Mr. Harpole: That isn't always the case, your Honor. I might recommend against the appeal, but the decision would be made by the Solicitor General.

The Court: In other words, you are not prepared to say as to that?

Mr. Harpole: No, I never am. I never know until I get the information.

Mr. Lynch: I am frank to say if I thought there were not going to be sufficient funds on hand to pay both in full I would not want to pay any one of them to the prejudice of the other; but I very definitely believe the government would not in any way be prejudiced by our payment of this claim in full, because it is my conviction

that there will be sufficient funds on hand to pay all of them, assuming it [23] is eventually held the government is entitled to be paid out of this fund at all.

The Court: One of my difficulties, too, gentlemen, is that I have only hold of a part of the problem. It would have been better for one of the local resident judges to have dealt with this, when you consider there is involved in my decision on this the foreclosure question. If I should deny Mr. Shelton money he feels he is entitled to, and he feels it strongly, that is apparent, three weeks from now, when I have left town, he is going to be before another judge here asking for a foreclosure, quite likely, and if he is a good man for his client, he no doubt would. I would feel pretty strongly too, if I had drawn up a contract and the situation had turned up as it has, that I would have to back up my ante; so I will think about it a little more for those reasons. It is not a thing I feel I should attempt to decide right now. I will ask the reporter to run these notes off, and if there is anything more occurs to you, considering the other demands on your time, which you would like me to have, I will welcome any further suggestions.

Mr. Lynch: With the court's permission, I think I will talk to the clerk, and see if there is available that contract.

The Court: Isn't it set forth in the file?

Mr. Lynch: No, it is not. There have been so many reviews of this matter, and the contract is so long, we have just referred to it by reference. The contract is on file in the clerk's office.

[Endorsed]: Filed Mar. 9, 1945. [24]

[Endorsed]: No. 11059. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. H. F. Metcalf, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., a corporation, Bankrupt, and Security-First National Bank of Los Angeles, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed May 14, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11059 .

UNITED STATES OF AMERICA,

Appellant,

- v -

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, and H. F. METCALF, TRUSTEE IN BANKRUPTCY OF F. P. NEWPORT CORPORATION, LTD, a corporation.

Appellees.

STATEMENT OF POINTS RELIED UPON
ON APPEAL

The appellant states that it intends to rely in its appeals from the Orders of the United States District Court, dated March 6th and April 13, 1945, upon the points mentioned

in the Statement of Points relied upon by appellant, found at pages 36 and 37 of the record in said appeal.

Dated: this 9th day of May, 1945.

CHARLES H. CARR, United States Attorney
E. H. MITCHELL, Asst. U. S. Attorney
GEORGE M. BRYANT, Asst. U. S. Attorney
EUGENE HARPOLE, Special Attorney

Bureau of Internal Revenue

By Eugene Harpole

Attorneys for Appellant.

Received a copy of the within Statement of Points Relied Upon on Appeal this 17 day of May, 1945. W. C. Shelton & George W. Burch, Jr., by E. J. Lincoln, Attorneys for Appellees, Security-First National Bank of Los Angeles. Bailie, Turner & Lake, by Allen T. Lynch, Attorneys for Appellee, H. F. Metcalf, Trustee in Bankruptcy.

[Endorsed]: Filed May 18, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR CONSOLIDATION OF APPEALS FROM THE ORDERS OF THE DISTRICT COURT OF MARCH 6th AND APRIL 13, 1945.

It is hereby stipulated and agreed by and between counsel for the appellant and the appellees, subject to the approval of the Court, that the Appeal of the United States from the Order of the District Court of March 6, 1945, may be consolidated with its Appeal from the Order of

the District Court of April 9, 1945, and that said appeals when so consolidated may be further consolidated with the Appeal of the Security-First National Bank of Los Angeles from the Order of the United States District Court of February 6, 1945, and that the record on appeal of said Security-First National Bank may be used in connection with and as a supplement to the record in the Appeal of the United States from the said Orders of the District Court of March 6th and April 9, 1945.

Dated: this 9th day of May, 1945.

CHARLES H. CARR, United States Attorney
E. H. MITCHELL, Asst. U. S. Attorney
GEORGE M. BRYANT, Asst. U. S. Attorney
EUGENE HARPOLE, Special Attorney,
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By W. C. Shelton

Attorneys for Appellees, Security-First
National Bank of Los Angeles

BAILIE, TURNER & LAKE
By Allen T. Lynch

Attorneys for Appellee, H. F. Metcalf,
Trustee in Bankruptcy.

It Is So Ordered this 18th day of May 1945.

FRANCIS P. GARRECHT
Circuit Judge

[Endorsed]: Filed May 18, 1945. Paul P. O'Brien,
Clerk.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a
national banking association,

Appellant,

vs.

UNITED STATES OF AMERICA and H. F. METCALF, Trustee
in Bankruptcy for the Estate of F. P. Newport Corpora-
tion, Ltd., a corporation, bankrupt,

Appellees.

APPELLANT'S OPENING BRIEF.

W. C. SHELTON and

GEORGE W. BURCH, JR.,

923 Subway Terminal Building, Los Angeles 13,
Attorneys for Appellant.

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No. 11051

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a
national banking association,

Appellant.

vs.

UNITED STATES OF AMERICA and H. F. METCALF, Trustee
in Bankruptcy for the Estate of F. P. Newport Corpora-
tion, Ltd., a corporation, bankrupt,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdi-
ction of United States District and United States
Circuit Court of Appeals.

This is an appeal from an order of the United States
District Court for the Southern District of California,
Central Division, Honorable Paul J. McCormick, Judge,
entered February 6, 1945, in C. O. Book 30, page 632,
confirming and approving an order of Ernest R. Utley,
Referee in Bankruptcy in the Matter of F. P. Newport
Corporation, Ltd. a bankrupt, directing the payment of
1938 and 1939 Federal Income Taxes incurred by the
Trustee in Bankruptcy, H. F. Metcalf, in conducting the
business of said Bankrupt, out of rents, issues and profits

hypothecated to Security-First National Bank of Los Angeles as security for the payment of the indebtedness due it from said bankrupt.

The petition of the United States Government [Tr. p. 81] alleged that the Trustee in Bankruptcy, H. F. Metcalf, in the matter of F. P. Newport Corporation, Ltd., a bankrupt, had failed, neglected and refused to pay Federal income taxes found to be incurred by him for the years 1938 and 1939; that petitioner was informed and believed that Security-First National Bank of Los Angeles claimed an interest in and the right to receive all available funds in the above entitled bankrupt estate. Petitioner prayed that said Trustee in Bankruptcy and said Bank be ordered to show cause why the Trustee in Bankruptcy should not be ordered to pay said Federal income taxes together with interest thereon out of funds in his hands.

Security-First National Bank of Los Angeles, the appellant herein, answered said Petition [Tr. p. 83] admitting it claimed an interest in and a right to collect all of the available funds in said bankrupt estate and denied that the United States Government or any one other than said bank had any lien or interest in said funds or was entitled to receive all or any portion thereof. Said bank prayed that the United States be denied the relief prayed for in its petition but that the court decree that the bank has a first and prior lien on all such property and the rents, issues and profits derived therefrom as security for the payment of its indebtedness due by said bankrupt; that it decree that said trustee in bankruptcy is in possession of said real

property, oil royalties, rents, issues and profits from said real property for and on behalf Security-First National Bank of Los Angeles; that the court order the trustee in bankruptcy to continue to disburse to said bank the oil royalties and other rents, issues, and profits free and clear of any claim of United States or of the claim of the Trustee for expenses of administration. This answer was filed October 13, 1943. The trustee in bankruptcy in said matter answered the petition [Tr. p. 95] alleging that all available funds out of which the claim for Federal income taxes could be paid were claimed to be subject to a first and prior lien by said bank and that the bank claimed that the United States Government could not have its claim for income taxes paid out of the oil and gas royalties referred to in said answer either in whole or in part; that said income taxes were not entitled to priority over any other expense of administration and that if the government was entitled to have its claim for taxes paid out of said royalties, rents, issues and profits, then the other expense of administration should be paid out of the same funds on equal parity with the said claim. The trustee in bankruptcy prayed that the court determine whether or not the expenses of administration, including the claim for income taxes due the United States of America are payable out of said oil royalties and for general relief.

The jurisdiction of the trial court and of this court derives from U. S. Code, Title 11, Chapter 2, Section 11 and Chapter 4, Section 47. Said Sections are found in Sections 2 and 24 of the Bankruptcy Act.

Statement of Case.

Under date of March 1, 1930, the bankrupt, F. P. Newport Corporation, Ltd., executed and delivered to Security-First National Bank of Los Angeles its promissory note for \$760,000, evidencing an indebtedness then due the bank in said sum [Tr. p. 3]. As security therefor the bankrupt conveyed to said bank, in trust with power of sale, a large number of parcels of real property situated in various locations in Los Angeles County. On even date with said note the said bank, as trustee, and the said bankrupt, as Trustor Beneficiary, executed a Declaration of Trust by the terms of which the bank declared that it held the said property as trustee with power of sale as security for the payment of said indebtedness, and any other indebtedness secured thereby, and to collect the proceeds, and avails, rents issues and profits of the trust estate and disburse the same in accordance with the terms and conditions of said Trust Declaration [Tr. p. 2].

This Trust was then known as Trust No. 70401 [Tr. p. 2]. It was subsequently and, at all times involved herein, known as Trust No. D 7224 [Tr. p. 101].

Parcel 4 of the property originally conveyed to the Trustee was the beneficial interest in Trust P 1512 of Title Guarantee & Trust Co., the corpus of which was composed of approximately nine acres of land on Channel No. 3 of the Long Beach Harbor [Tr. pp. 29-30]. This property, after the title thereto had been finally and successfully litigated in favor of the bankrupt, and after other claims had been compromised and paid off, from advances made by Security-First National Bank of Los Angeles to the Trustee in Bankruptcy under court order, was conveyed to Security-First National Bank of Los Angeles by Title Guarantee & Trust Company and became a part of the

corpus of said Trust No. D 7224 subject to the terms of said Declaration of Trust and the contract entered into modifying and amending the same [Tr. p. 112 and p. 170].

In 1935, said indebtedness then being in excess of one million dollars, the bank commenced foreclosure proceedings, the sale being set for the latter part of March.

On or about March 27, 1935, an involuntary Petition in Bankruptcy against F. P. Newport Corporation, Ltd., was filed in the United States District Court and H. F. Metcalf was appointed Receiver in Bankruptcy for said alleged Bankrupt. The said bank was, on said date, enjoined from foreclosing the security held by it under the terms of said Declaration of Trust [Tr. p. 102, p. 165].

This injunction was continued from time to time over the opposition of said bank until the Contract dated January 12, 1937 was approved by the District Court on January 12, 1937, and F. P. Newport Corporation, Ltd., was adjudicated a Bankrupt [Tr. p. 165]. During this time and up to February 1, 1937, the bank had advanced \$107,-768.60 for taxes, assessments and carrying charges on the trust properties [Tr. p. 165]. As of the date of said contract, January 12, 1937, the agreed debt was \$1,351,727.38 [Tr. p. 101].

Prior to January 12, 1937, the Receiver in Bankruptcy, the Bank and the F. P. Newport Corporation Ltd., the alleged bankrupt held "extensive negotiations for the purpose of devising a method of liquidation of the properties held by the bank as security" [Tr. p. 168]. These negotiations resulted in a contract dated January 12, 1937, which permitted an orderly liquidation of security held by the bank [Tr. p. 168].

This agreement provided for the adjudication of the alleged bankrupt as a bankrupt, the appointment of a

trustee in bankruptcy, and the submission of the contract to the bankruptcy court for its approval, and, if approved, for the liquidation of the properties and the payment of the bank's indebtedness promptly in certain installments [Tr. pp. 100 to 115].

The District Court approved the contract and on the same date, January 12, 1937, that F. P. Newport Corporation, Ltd., was adjudicated a bankrupt. Thereafter H. F. Metcalf the former Receiver, was appointed trustee, for the creditors, and petitioned the court for approval of the contract. The Referee approved the contract after a supplemental agreement dated August 31, 1937, was executed by the parties [Tr. pp. 118 to 131]. After a review was taken from Referee Utley's Order of Approval, the said contract, after two modifications suggested by Judge McCormick were stipulated to by all parties, was finally approved by Judge McCormick on November 5, 1937 [Tr. p. 181].

On appeal to this Circuit Court of Appeals, the order of Judge McCormick was in all respects affirmed [Tr. p. 182] *certiorari* was denied by the United States Supreme Court. By this judgment the bank's security was declared to be a trust deed, legal and valid in all respects and the contract of January 12, 1937 as supplemented and modified and then approved by Judge McCormick to be fully ratified and approved, and the Order of Judge McCormick approving the contract was affirmed.

By the terms of this contract, as supplemented and modified, the income, rents, issues and profits from the trust estate of Trust D 7224 held by the bank as security were expressly impressed with the lien of said trust deed and were expressly sequestered for payment in full to the bank by the trustee in bankruptcy to be applied on its indebted-

ness. The income, royalties, rents, issues and profits were expressly declared to be no part of the general assets of the bankrupt estate. They were expressly earmarked for application on the bank's indebtedness and were to be kept in a separate account while in the hands of the trustee in bankruptcy and be paid *in full* to the bank forthwith [Tr. p. 121 and p. 130].

Under date of January 14, 1938, an Oil and Gas Lease was entered into with Universal Consolidated Oil Co. a California corporation, by the said bank, the trustee in bankruptcy, and the bankrupt, under order of the bankruptcy court, on the 9 acre parcel situated in the Long Beach Harbor area [Tr. p. 132 and p. 237]. Oil and gas were discovered by the lessee that year and substantial quantities of oil and gas were produced therefrom during the years 1938 and 1939.

All bonuses and royalties from said lease were, pursuant to said contract, placed in a special oil account by the Trustee in Bankruptcy. Thereafter all said bonuses and royalties for the years 1938 and 1939, were paid over to the bank pursuant to the said sequestration agreement. For said years the bank received \$451,851.00 of which \$97,-665.88 was applied on interest and \$59,665.88 on taxes assessed against the trust property [Tr. pp. 237-238].

Subsequently thereto the Internal Revenue Department of the United States Government assessed income taxes for the years 1938-1939 in the sum of \$19,363.65 against the Trustee in Bankruptcy on the theory that the said trustee was not liquidating the bankrupt estate but was

conducting the business of the bankrupt. This assessment of taxes was resisted by the Trustee in Bankruptcy. The bank was not a party to these proceedings.

This Circuit Court of Appeals reversed Judge McCormicks' order disallowing the government's claim for said taxes, whereupon on April 8, 1945, Judge McCormick entered his order pursuant to mandate of said Circuit Court, adjudging that said Trustee in Bankruptcy was indebted to the United States Government in the sum of \$19,363.65 for 1938 and 1939 income taxes.

Said taxes remaining unpaid, the United States Government filed the instant Petition for its Order to Show Cause directed to the Trustee in Bankruptcy and said bank, ordering them to show cause why an order should not be made directing said taxes to be paid out of any funds held by the trustee.

The trustee answered, alleging that the bank claimed all of said funds as belonging to it under its deed of trust and the agreement of January 12, 1937, as modified and amended and it could not pay said indebtedness from these funds, most of them arising from royalties rents, issues and profits, until the court passed on the question of the bank's claim to have the same paid over in full to it.

The bank answered, claiming all the funds as being impressed with its lien and as being sequestered funds held by the trustee for the payment on its debt.

The District Court held that said funds were available to the Trustee to pay said income taxes and ordered the Trustee to pay said taxes [Tr. pp. 358 and 359]. The bank takes its appeal from the said Order.

Assignment of Errors.

Upon this Appeal appellant urges:

I.

The District Court erred in holding that the income tax for the calendar years 1938 and 1939 was the result of income, the full benefit and enjoyment of which was had by the Security-First National Bank of Los Angeles.

II.

The District Court erred in holding that the properties, the record title to which is held by the bank under its Trust D 7224, as security for the obligation owing to said bank by the bankrupt, have been administered by the Trustee in Bankruptcy by and with the consent and approval of the said bank and for the benefit of the said bank.

III.

The District Court erred in holding that the income taxes for the years 1938 and 1939 are incidental to said administration and a necessary part of the expense of operating, preserving and liquidating the properties and proceeds thereof.

IV.

The District Court erred in finding that Security-First National Bank of Los Angeles had the full benefit of the income which resulted in the assessment of said taxes and should, therefore, pay the said taxes out of that income.

V.

The District Court erred in finding that by the provisions of the agreement of January 12, 1937, as supplemented and modified, the oil and gas royalties can be used to pay said income taxes.

VI.

The District Court erred in holding that the claim of the United States Government for said income taxes should be paid out of the special accounts of said trustee in bankruptcy, and that if the funds now deposited in Special Accounts are insufficient to pay said taxes that they should pay any deficiency out of oil and gas royalties when and as received from Universal Consolidated Oil Co.

VII.

The District Court erred in holding that the Referee in Bankruptcy did not err in his order of June 6, 1944, directing said Trustee in Bankruptcy to pay said income taxes out of the oil royalties, rents, issues and profits received by him and deposited in special accounts pursuant to the agreement of January 12, 1937.

VIII.

The District Court erred in affirming the Order of the Referee in Bankruptcy dated June 6, 1944, directing the payment of taxes out of funds impressed with a first and prior lien in favor of said bank and sequestered by the agreement of January 12, 1937 as modified and amended for the payment of said bank's indebtedness.

ARGUMENT.

The Bank's Lien Is No Part of the Bankrupt Estate and Is Not Chargeable With the General Costs of Administration of the Bankrupt's Estate.

The Bankruptcy Act defines the bankrupt estate as follows:

“The bankrupt's estate consists of property of a bankrupt diminished by valid liens.”

In re Tressler, 20 F. (2d) 663.

This Honorable Court in the case of

In re Williams, 156 Fed. 934 at 939 (9th Cir.),

said:

“They” (the proceeds from property subject to a valid lien) “are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the trustee or of his attorney. If so, the valid lien upon the estate of a bankrupt which the Bankruptcy Act expressly declares shall be unaffected by any of its provisions might very readily be destroyed, as it would unquestionably be, should such costs equal or exceed the proceeds in cases like the present, where the aggregate amount of the valid lien exceeds the proceeds of the entire estate of the bankrupt.

In line with this ruling are the cases of *Stewart v. Platt*, 101 P. S. 731-739 25 L. Ed. 816; *In re Ult*, 105 Fed. 754, 45 C. C. A. 32; *In re Prince & Walker* (D. C.), 131 Fed. 546, 552; *In re Soulier Cornice & Roofing Co.* (D. C.), 133 Fed. 598, 963; Loveland on Bankruptcy (3rd Ed.), p. 7. See, also, *Collier on Bankruptcy* (6th Ed.), p. 497.”

In the case at bar the bank was enjoined from 1935 to 1937 from foreclosing its lien while it was compelled to advance money for real property taxes, a prior lien on the property, to the extent of thousands of dollars.

From January 12, 1937, when adjudication in bankruptcy took place, and the agreement of January 12, 1937, as supplemented and amended, became effective, sequestering all of the rents, issues and profits to pay the bank's indebtedness, and providing for prompt liquidation of the property subject to the bank's lien, the trustee in bankruptcy without an order of the court, and over the protest of the bank, elected not to liquidate the property, but to operate the business of the bankrupt. In this connection he has incurred not only the income taxes for 1938 and 1939, the subject of this litigation, but additional income taxes for subsequent years, which together with interest on said unpaid income taxes, approximates the sum of \$65,000.00 as of April 20, 1945. [Tr. Case No. 11059 pp. 10 and 11.]

As of February 10, 1945, the Referee in Bankruptcy found that there remained unpaid on the bank's obligation in excess of \$450,000.00 of principal alone and that as of September 13, 1944, there was unpaid interest due the bank of \$5,264.00. [Tr. Case No. 11059 p. 4.] As of Tuesday, November 23, 1943, it was stipulated that the balance of unpaid principal was \$617,278.12. [Tr. p. 28.]

The bank's obligation draws interest at 4% per annum, so that additional interest at that rate from September 7, 1944, is also unpaid.

The Bank Holds a Deed of Trust Against All of the Property in Trust D7224 With a First and Prior Lien on All Income, Rents, Royalties, Issues and Profits Therefrom.

When the order authorizing the execution of the contract of January 12, 1937, as supplemented and modified, was before this Honorable Court in July of 1938 (*In the Matter of F. P. Newport Corporation Ltd.*, 98 F. (2d) 453) [Tr. p. 182], the question of the validity of said Trust No. D 7224 was in question. Also in question was whether the contract of January 12, 1937, surrendered the bankruptcy court's jurisdiction to administer the said estate and prolonged or "projected into the future" the liquidation of the bank's claim.

In that decision this Honorable Court held:

"The conveyance and assignment by the Bankrupt to the bank, together with the Declaration of Trust executed by them, constituted a Deed of Trust."

And again:

"We hold, therefore, that the Deed of Trust was valid and enforceable."

And again:

"In approving, with modifications, the agreement of January 12, 1937, the trial court has not, as contended by appellant, surrendered its jurisdiction to administer the bankrupt estate. The court retains and is exercising that jurisdiction by and through the trustee in bankruptcy."

"Nor is it true that, under the agreement, administration of the estate will be unduly prolonged, or, as appellant says, 'projected into the future.' Under the agreement as modified, liquidation of the bank's

claim must be completed on or before September 7, 1940. That does not seem to us an unreasonable time."

Thus we see that this court found said agreement valid as being no surrender of the jurisdiction of the bankruptcy court nor as unduly delaying or projecting into the future the liquidating of the bankrupt estate on which the bank held its lien. The court found that by the contract the liquidation of the bank's claim must be completed before September 7, 1940, which was a reasonable time for liquidation according to the opinion.

In this connection we call to the attention of this court paragraph 7 of the Certificate of Review of Referee Utley in case No. 11059, which case is being heard concurrently with this case, where he says:

"There is now owing and unpaid to said Bank on account of the secured obligation hereinbefore mentioned in excess of \$450,000.00 in principal; that heretofore and on the 31st day of October, the Referee made an order herein denying without prejudice the petition of the Security-First National Bank of Los Angeles, for leave to foreclose under the terms of its Trust, pursuant to which it held title to the bulk of the properties of this estate as security for the money so owing it.

By the terms of said order it was provided, among other matters, that the Bank might renew said petition to foreclose at any time on or before June, 1945, if there should be a change in circumstances which would seriously prejudice the interests or security of said Bank. Heretofore interest owing said Bank has been duly paid as it fell due, pursuant to the orders

of this court. Said Bank now threatens to renew its said petition for leave to foreclose if the interest above mentioned is not paid." [Tr. Case No. 11509 pp. 5 and 6.]

Thus we see that the bank, after a decade of time, is still restrained from foreclosure.

And the bankruptcy court has now ordered that income taxes, incurred by its trustee while holding off the bank and operating the business of the bankrupt instead of liquidating the property, may be paid out of rents, royalties, and income on which the bank has a first and prior lien and which, by the agreement of January 12, 1937, as supplemented and amended, were sequestered for the payment of the bank's indebtedness.

The Rents, Issues and Profits, Including Oil Royalties and Rents, Are Subject to the Lien of the Bank and Sequestered for the Payment of Its Indebtedness.

The Declaration of Trust in Trust D 7224 in Article Sixteenth thereof provided:

"All proceeds and avails arising from rents, issues and sales of the trust property, or otherwise, shall be paid to and received by the said Trustee." [Tr. p. 54.]

By the terms of Article Twentieth the bankrupt had no right, title or interest in or to the property covered by the trust, "the sole right and power of the beneficiary hereunder being to enforce the performance of the terms of this trust as expressly set forth in this Declaration." [Tr. p. 63.]

Thus we see that all the royalties, rents, issues and profits were hypothecated with the bank as security for its indebtedness. These rents, issues and profits were part of its *primary security*. The bank was legal and equitable owner of said property.

That parties may convert their interest in and to trust real and personal property into personal beneficial interests has been expressly decided in California. See

Wright v. Security-First National Bank of Los Angeles, 35 Cal. App. (2d) 264.

In the contract of January 12, 1937, as modified and amended, the bank waived its right to foreclose by a pledgee's sale of the bankrupt's beneficial interests in Trust D 7224.

The appointment of a Receiver in Bankruptcy in March, 1935, and the injunction barring foreclosure sale by the bank could not take from the bank its legal right to the rents, issues and profits of the trust estate and these rights remained unimpaired during the receivership. In fact such injunction against sale effected a sequestration of said rents.

The contract of January 12, 1937, as modified and amended, was entered into to break out of the deadlock imposed by the court and start liquidation.

This contract recites:

“The Bankrupt and Receiver are desirous of further postponing the foreclosure by the bank of said security for non-payment of said indebtedness, and are desirous of starting the immediate liquidation of said indebtedness by the Bank, by the sale of certain of the real properties held by the Bank in said above referred to trust.

The Bank is willing to delay further the foreclosure of the said security and will agree to the immediate sale of certain of the assets in said Trust on the terms, and subject to the conditions herein-after contained, and not otherwise, hence this Agreement.” [Tr. p. 102.]

The Referee found in approving the execution of the said agreement:

“That unless the said proposed contract between the said Bank, the bankrupt and the trustee of this estate is executed promptly, *in order to permit liquidation thereunder* and protection of the assets held as security by the said Bank and of this estate, the said Bank threatens to withdraw all negotiations for the amicable liquidation of the property of this estate and insist, by reason of the heavy carrying charges of said property and the long period of time during which said obligation has been in default and the failure of the bankrupt or the receiver or trustee of the bankrupt estate to make any payment on said obligation or for taxes, assessments or interest or other carrying charges, on its right to an immediate foreclosure of said obligation and the sale of said property. That it is highly improbable that one single purchaser, or any group of purchasers acting in concert, could be found who would be willing to pay on a sale thereof the sum of \$1,351,729.38, plus trustee’s fees and expenses, interest and advances, to which the Bank would have been entitled upon a foreclosure and sale under the terms of its security.”

[Tr. pp. 170-171.]

The decision of this Honorable Court reversing the District Court’s order rejecting the claim of the United States Government for income taxes for the years 1938

and 1939, holding them to be a valid charge against the Trustee in Bankruptcy, expressly calls attention to the fact that the Trustee in Bankruptcy was not liquidating the property of the bankrupt estate as called for in the agreement of January 12, 1937, but in fact was operating the business of the bankrupt and hence was subject to income taxes. Although the bank was no party to said proceeding, we point to this decision to show that had the trustee liquidated under the agreement as called for thereby, no tax would have been incurred. This decision was introduced in evidence by the United States Government [Tr. p. 255] by reference. It is found in Vol. 133 F. (2d), page 677.

The point made is that, if the trustee failed to liquidate as the contract provided, that his expenses as an operating trustee, including income taxes, may not be charged against the royalties, rents, issues and profits lest the bank's security be frittered away by the trustee. We again refer to the decision of this Honorable Court in the case of

In re Williams, 156 Fed. 934 (1934),

cited and quoted from *supra*, to show that may not be done.

The contract of January 12, 1937, as supplemented and modified and then approved by Judge McCormick and this Honorable Court, expressly provided:

“While the said Declaration of Trust No. D 7224 and the Contract of January 12, 1927, provide expressly that all moneys from Sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring that all bankruptcy funds be accounted for by the

Trustee and be disbursed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D 7224, and the agreement of January 12, 1937, as modified hereby."

"Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds of money so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust shall, until the indebtedness due the Bank has been paid and except as hereinafter provided, be, while in his possession, impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and, except as in said agreement and said supplement provided, shall not until, the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate." [Tr. pp. 129, 130.]

The above language provides, as clearly and unambiguously as the English language is capable of providing, that in giving up its right to collect the rents, issues and profits from the properties held by it in Trust No. D 7224, and allowing the Trustee in Bankruptcy to collect the same, that it did not waive the right to have the same

immediately paid over to it *in full* to be distributed in accordance with the Declaration of Trust D 7224, and the said agreement of January 12, 1937, as supplemented and modified.

The contract expressly recognized that the bank had a prior right to these incomes, rents and royalties and the proceeds from sales until its indebtedness was paid in full. The contract recognized that all such funds while in the hands of the trustee were impressed with the lien of the Declaration of Trust. They were required to be kept segregated by the Trustee in Bankruptcy in separate bank accounts and not be commingled with other funds of the bankrupt estate. They were "earmarked" for application on the bank's indebtedness. They were to become no part of the assets of the bankrupt estate.

This agreement, so plain and unambiguous, sequestered these funds for the bank's indebtedness. They did not become a part of the bankrupt estate, but were to be held in trust by the Trustee in Bankruptcy for the bank and be paid over in full forthwith to the bank.

The District Court and this court understood that these funds belonged to the bank when they approved the contract.

The District Court has, by the order appealed from, directed its Trustee in Bankruptcy to scrap the agreement it approved in 1937 and to pay to a third party, the United States Government, expenses incurred by the trustee in operating the bankrupt's business out of the bank's funds.

We shall show, that by such sequestration agreements, such rents, issues and profits are not assets of the bankrupt estate, and are not available to pay such costs of administration.

Both Federal and State Decisions Sustain Such Sequestration Agreements and Enforce the Terms Thereof.

In the first place we may comment that the right to contract about property is a right guaranteed by both Federal and State Constitutions. The principle is well and briefly stated in Cal. Jur., Vol. 5, Section 135, page 736, as follows:

“It has come to be well recognized that the rights of liberty and pursuit of happiness in which the individual is protected by the Constitutions of the United States and of California, apply as fully to his right of contract, untrammeled by unnecessary regulations as they do to the freedom from arrest or restraint of his person. Similarly the right of acquiring, possessing and protecting property guarantees to the individual the right to *contract with others respecting the use to which he may subject his property and the manner in which he may enjoy it.*”

The contract of January 12, 1937, as supplemented and modified, and as approved by the courts, vested in the bank, as its property, the royalties, rents and income from the properties held in its Trust D 7224. To permit the United States Government to invade them to pay the Trustee in Bankruptcy's income taxes violated the provisions of the Constitution against taking property without paying therefor.

It might be well to point out that there is no statute giving the United States Government a first and prior lien on real or personal property over valid contract liens.

The State of California has granted a first and prior lien on real estate in the State for the payment of State and County taxes against the same.

See

Political Code of California, Sections 3716 and 3788.

Hence the bank and the Trustee in Bankruptcy have annually paid these State real estate taxes to protect the trust properties from such a lien. If the United States Government possessed such a lien prior to the bank's rights, this controversy would not be taking this court's time.

Section 2897 of the Civil Code of California provides that "other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomer and respondentia."

The Federal statutes do give the Revenue Department the right to file a lien against property of an income tax debtor for income taxes due and unpaid, but such lien would clearly be behind and subsequent to the contract lien of the bank on the trust property and the rents, issues and profits therefrom. That no doubt explains why the Government instead of standing on its lien rights is trying to "back in by a side door" and take money belonging to the bank to pay the trustee's income tax debt.

The sequestration of the rents, issues and profits from the trust estate was, as we have heretofore pointed out, an accomplished fact long before any claim of the Government against the trustee for income taxes arose.

When the court restrained the bank from continuing with the foreclosure of its security in 1935 and placed a receiver in charge the effect was a sequestration of said rents, issues and profits to which the bank was entitled under its Declaration of Trust.

When the contract of January 12, 1937, as supplemented and amended, was executed by the Trustee in Bankruptcy with the full approval of this court, and the trustee was ordered to perform the terms thereof, the sequestration was continued on the terms and conditions of the contract and the rights of the bank to the said rents, issues and profits became absolute.

The case of

In the Matter of Wakey (C. C. A. 7th, 1931),
50 F. (2d) 869, 18 Am. B. R. (N. S.) 512,

illustrates the principle. In this case the Trustee in Bankruptcy collected the rent from the mortgaged premises for two years. The mortgagee then petitioned the court for an order directing the trustee to apply the rents and profits to the payment of the interest due upon the mortgage. The referee denied his petition and his order was affirmed by the District Court. This appeal was taken from the court's order. The court, in 18 Am. B. R. (N. S.) 512, *supra*, at page 513 said:

"It is not questioned but that the rents and profits of land, as well as the land, may be the subject of a valid mortgage lien (citations). It seems equally clear in Illinois that the lien upon the rents and profits is not ordinarily enforceable until the mortgagee begins foreclosure proceedings, and a receiver, or other officer appointed by the court, takes possession of the property described in the mortgage. Dillon v. Dyer, 258 Ill. App. 144. . . . after the appointment of such receiver in the mortgagee's suit, the mortgagee's right to the rents thereafter collected is clear. Roher v. Deatherage, 336 Ill. 450; Dillon v. Dyer, *supra*; St. Louis Union Trust Co. v. Wabash

etc., 258 Ill. App. 9. In this case the mortgagee made no application for permission to foreclose his mortgage, and not until after two years' rent had been collected by the trustee did he ask to have the same applied upon his mortgage. This failure on his part to assert his lien would have been fatal to his application here but for the intervention of the bankruptcy proceedings. Doubtless the bankruptcy proceedings and the appointment of the trustee dispensed with the requirement that the mortgagee should start foreclosure proceedings and secure the appointment of a receiver. . . . Our conclusion is that the trustee in bankruptcy represented all of the creditors, the secured, the preferred and the unsecured, that under Isaac's Trustee v. Hobbs Tie and Timber Co., *supra*, 282 U. S. 734, 17 A. B. R. (N. S.) 273 (decided Feb. 24, 1931), appellant could take no steps to perfect a lien upon the rents save in the court of bankruptcy; that he correctly assumed that his rights would be protected by the court of bankruptcy when it came to distribute the funds in the trustee's possession, derived either from the sale of the farm or from the rentals of the farm. . . . In reaching this conclusion we have not overlooked the contention based upon the proposition that the provision of the mortgage covering rents and profits conveyed a right to a lien rather than an unqualified lien—a condition precedent to the creation of such lien was necessary, viz.: the appointment of a receiver to collect the rents and profits. Inasmuch as this receiver would ordinarily not be appointed, except upon a showing that the property was insufficient to pay the mortgage debt, and inasmuch as the income belonged to mortgagor, or in case of his bankruptcy to the trustee, until such receiver was appointed, it has been argued that such income belonged to the

trustee in the absence of a showing that the property was insufficient to satisfy the mortgage debt. The weakness of this argument lies in the fact that the trustee, as the successor of the mortgagor, collected the rents and profits and held them for the benefit of the unsecured creditors, the secured creditors and the preferred creditors. He occupied a position akin to that of a receiver appointed at the instance of a judgment creditor in a suit where the first mortgagee is made a party, and the order appointing the receiver fails to designate the parties for whom the receiver should collect the rents and profits."

The facts in the case at bar are much stronger. Here under its Declaration of Trust actual title to the legal and equitable estate of the debtor passed to the bank as Trustee and with the title the right to collect and disburse all income was granted it. When the bank's foreclosure was restrained in 1935 and a receiver in Bankruptcy appointed to take possession of the bank's property, the right to all income had vested in the bank. In 1937 when the contract of January 12th as amended was entered into, the right of the bank to receive all the income, rents, royalties etc., was expressly preserved to the bank and continued the sequestration thereof.

A very recent case, decided in 1936 by our Circuit Court of Appeals for the 9th Circuit, decided the validity of such sequestration by the secured creditor and discusses facts very analogous to the case at bar, but not so conclusive as those herein.

The case is:

American Trust Co. v. England, 84 Fed. (2d) 352.

In that case there were three mortgages on bankrupt's real property. Upon default, acting under the terms of the third mortgage, the Trustee in Bankruptcy of the third mortgage took possession and collected rents. Thereafter the Trustee in Bankruptcy of the first mortgage moved to sequester the rents thus collected, which motion was held to be the equivalent of the taking of possession by the first mortgagee under its mortgage. The Trustee in Bankruptcy of the mortgagor also claimed these rents. The court held that the Trustee in Bankruptcy of the third mortgagee was entitled to hold the rents collected by him as against the Trustee in Bankruptcy of the Mortgagor, claiming them for the benefit of the unsecured creditors.

The court held that the Trustee in Bankruptcy of the first Mortgagee was entitled to the rent *subsequent* to the filing of its sequestration petition.

The court likewise held that where a mortgage provided that in case of default the mortgagee might take possession of and manage mortgaged property, the demand by first mortgagee upon Trustee in Bankruptcy of third mortgagee in possession of property for sequestration of rents followed by a sequestration order held equivalent of taking possession, entitling first mortgagee to proceeds of operation of mortgaged property subsequent to sequestration proceedings. (Civ. Code, Cal. No. 2927; C. C. P. Cal. No. 744.)

The court at page 356, said:

“The demand of the appellant upon the Trustee for sequestration of rents and the referee's order for the sequestration, is the equivalent of the taking of pos-

session by the appellant under its trust instrument (*Mortgage Loan Co. v. Livingston C. C. A.* 8) (45 P. (2d) 28). In that case the mortgagees were entitled to possession under the provisions of the mortgage, but the possession was in the hands of a Receiver in Bankruptcy proceedings. The mortgagee requested the Receiver to sequester the income from the mortgaged property from other income of the receivership. The receiver stated he would so sequester the income. Afterwards, as here, the mortgagees filed a petition for leave to foreclose the mortgage. This was at first denied without prejudice. Thereafter, as in the present case, it was granted. In holding that the mortgagees were entitled to this income remaining in the hands of the receiver, the court said:

'In effect the mortgagees made themselves parties to the bankruptcy proceedings, recognized the receivership, but never acquiesced in an appropriation by him of the rents and issues of the property to the use and benefit of the general creditors, but promptly and persistently insisted that these rents and issues be impounded by the receiver, and either be used in the discharge of the taxes and insurance or be turned over to them—while it is true these mortgagees acquiesced in the collection of these rents and profits by the receiver, they did so on the understanding that they were impounded and would be properly applied or accounted for, and it cannot be said that they ever acquiesced in an appropriation of them by the receiver on behalf of the general creditors. They were of course, unable to take possession of the property from the receiver, except on an order of the court, and the record in this case warrants the conclusion that the receiver was acting not only on behalf of the general creditors, in so far as this property was concerned, but was acting also on behalf of these mort-

gagees, and he collected and impounded these pledged rents and issues, keeping them separate and apart from his other accounts for apparently no other purpose than to make them available as a part of the security under this second mortgage . . . We are of the view that the mortgagees in effect intervened in the receivership proceedings in aid of their proceedings to foreclose, and this intervention operated to charge *all of the net income arising from the operation of the property by the receiver with the lien of their mortgage.* . . . To hold that the mortgagee had a legal right to these rents and issues under the provisions of their mortgage, but that they should be precluded from recovering the same because they had not technically pursued a legal remedy is to overlook the fact that the property was in control of a court of equity, and that equitable remedies commensurate with the legal rights of the parties should be available. To take from the mortgagees the property to which confessedly they are entitled under the pledge provision of their mortgage, and transfer it to the unsecured creditors of the Bankrupt, appears to us as harsh, inequitable and unwarranted. . . . This is a proceeding in equity, and we find funds in the possession of the Trustee in Bankruptcy to which the appellant made proper claim and is in a position equivalent to his possession of the property as mortgagee in possession." (Emphasis added.)

The facts in the case at bar are even stronger than those in the *American Trust Co.* case. In the case at bar the bank had the legal title with the exclusive right to collect all rents. It had begun foreclosure, as in the case above. It was enjoined and a Receiver was placed in possession of the property, as in the above case. When the court barred it from foreclosure and took possession of the

property by its Receiver it in effect was acting for the secured creditor and collected the income for it.

When the Receiver, and subsequently the Trustee in Bankruptcy, agreed to collect the rents and pay them over *in full* to the bank, that according to the above decision, amounted to giving possession to the bank of all such rents with all the rights of a mortgagee in possession.

To allow this fund which belongs to the bank and which the court's officer with its full approval agreed to collect and pay over *in full* to the Bank, to be diverted to pay other creditors and claimants would, as the court said in the above case, be "harsh inequitable and unwarranted."

Bear in mind the bank would never have signed any such contract if it had not had the word of the Trustee, and the entire assurance of the court, by its order to the Trustee to perform, that all of said rents would be forthwith paid over to the bank as soon as collected.

Another Federal case arising out of bankruptcy which discusses the right of the mortgagee to the rents collected by the Trustee is

Associated Co. v. Greenhut, 66 Fed. (2d) 428 (3rd Circuit).

In this case the appellants held a first and second mortgage, respectively, upon certain property of the bankrupt. Both mortgages contained an express assignment of the rents. Default occurred on both mortgages and the District Court with consent of the Trustee, allowed a foreclosure of the mortgages, and the sale resulted in a deficiency on both mortgages. Both mortgagees made an application for the rents collected by the Trustee from the date of his appointment to the date of the foreclosure, less administration expenses.

The court, at page 429, said:

“The issue of this case is whether rents collected between the adjudication in bankruptcy and the sale under mortgage foreclosure proceedings belongs to the trustee of the bankrupt estate or to the mortgagee. The referee held that they belonged to the trustee, and in that he was sustained by the District Court.”

“The rule of law in this Circuit is uniform that, as between mortgagee and trustee in bankruptcy, the rents collected between adjudication and the sale, under foreclosure proceedings, belong to the mortgagee under claim of deficiency where the proceeds of the sale are insufficient to pay the mortgage indebtedness . . . *The mortgagee is the equitable owner of the bankrupt's real estate covered by this mortgage, and it would be inequitable to take the rents from what is really his property and divide them among general creditors . . . There is another reason why the rents thus collected should go to the mortgagee under claim of deficiency . . . Both bonds and mortgages expressly assigned the rentals to the mortgagee in case of any default in the performance of the covenants. The assignment, though conditional, became absolute, effective and enforceable upon the default which admittedly occurred.*” (Judgment of the District Court reversed.) (Emphasis added.)

This case again announces the principle that “The mortgagee is the equitable owner of the bankrupt's real estate covered by this mortgage and it would be inequitable to take the rents from what is really his property and divide them among the general creditors.”

In the case at bar we have the far stronger state of facts. The court itself approved the contract with the lien holders, providing that if the bank would forgive part

of the debt, reduce the interest rate and forego foreclosure for several years, its officer, the Trustee in Bankruptcy would collect the rents from the encumbered property and forthwith pay them over to the bank *in full*. And, until this proceeding of the Government was instituted, the Trustee has paid over all of said rents in full except such as the bank expressly waived the right to receive.

The United States Government is only a creditor of the Trustee in Bankruptcy and has no right whatever to funds belonging to the bank.

By the terms of the agreement with the bank the Trustee has no right to touch these funds for the payment of any indebtedness he may incur as such Trustee. The agreement with the bank is clear and unambiguous. The Trustee, under the advice of his able counsel, proposed this agreement to obtain the benefits given up by the bank. The court approved the agreement with full knowledge of the rights retained by the bank to all the rents, issues and profits from the property. They have had those very substantial benefits under the contract. It would now be harsh and inequitable to let any one steal away these funds belonging to the bank.

The California decisions are fully in accord with the principles laid down by the 9th Circuit Court of Appeals and the other Federal decisions.

In the very recent case of

Mortgage Guarantee Co. v. Lee, 61 A. C. A. 489
at 499.

the court said:

“It appears to be well established law in this state that rent may be assigned as security, and as such is an independent, primary security for the indebtedness, so long as the debt remains unpaid.”

In the case of

Title Guarantec & Trust Co. v. Monson, 11 Cal.
(2d) 621 at 627

we find this language:

"Within, and as a part of the deed of trust, the parties thereto had the right to insert any lawful conditions as a part of the consideration for the creation of the debt for which the property was hypothecated, and therein, upon default in payment, to invest in the plaintiff not only the right of possession, but also the right to rentals. *Snyder v. Western Loan & Building Co.* 1 Cal. (2d) 697, 702 (37 Pac. (2d) 86). And this covenant was equally binding upon a subsequent grantee of the land. To hold that, to the loss of the creditor, the covenants agreed upon between the debtor and the creditor thereafter could be repudiated by a subsequent grantee, as in effect is contended here, would be contrary to reason and fairness. The rights of the defendants were measured by the conditions and terms of the original trust deed. In Volume 41 C. J., p. 714, it is said: 'The purchaser of mortgaged premises will be entitled, as against the mortgagee, to recover or retain the possession only in case his vendor would have been so entitled . . . The purchaser is ordinarily entitled to all rents of the property accruing after the date of his purchase, unless they are expressly pledged in the mortgage as part of the security. Again, in the case entitled *Equitable Life Assur. Soc. v. McCartney*, 20 Fed. Supp. 37, the court says, 'The rights of the grantee of the mortgagor are no greater than that of her grantor, for she takes the property subject to the right to enforce the lien upon the rents'."

And on page 628, the same case, is found this language:

“In the case entitled *Owsley v. Reeves*, 179 Ill. App. 61, 63, appellant was deeded the premises ‘subject to whatever lien appellees secured thereon by virtue of the trust deed’; and the court there said: ‘Appellant cannot get away from the fact that his rights in the premises are subject to whatever lien was created in favor of the appellees by their trust deed. Rents and profits are the subject of mortgage. A mortgagee has a specific lien upon rents and profits of mortgaged land when they are expressly pledged by the mortgage as part of his security . . . Appellant, as subsequent purchaser, was bound by those terms of the trust deed . . .’ And in the case of *Townsend v. Wilson*, 135 Ill. App. 303, 308, it appeared that the purchasers of the premises there involved took the land ‘subject to’ a mortgage conferring the right to the rentals therefrom upon the mortgagee or his agent, at the time of foreclosure. In referring to the purchasers, the court said, ‘But their implied agreement . . . by accepting the deed with that proviso that it was subject to the mortgage, was that the land, the rents and profits mortgaged . . . should stand good for that debt and be charged with that debt as against any right they received by virtue of the deed. Their action in this case in claiming these rents simply amounts to a breach of their contract and they have no standing in law or equity in their claim to the rents’.”

In the case at bar, not only was the right to the rents given the bank in its Declaration of Trust, but by the Contract of January 12, 1937, amending the Trust Declaration, the debtor expressly agreed to collect these rents and turn them over *in full* to the bank, and during such time as they remained in his possession the contract im-

pressed the lien of the bank thereon. Some of these rents have not been paid over as agreed, and the bank in its petition has asked the court to order them paid over in full at once.

In:

Mortgage Guarantee Company v. Sampsel, 51 Cal.
App. (2d) 180

We find the plaintiff had a trust deed on the Villa Riviera Apartments, in Long Beach, Calif., and a chattel mortgage on the personal property therein. Both the trust deed and chattel mortgage provided that the rents, issues and profits were assigned to the plaintiff as further security and the trust deed provided in event of default in the trust deed or in the event of waste as defined therein, the holder thereof either by itself or by a Receiver to be appointed by a court therefor, could take possession and collect rents, issues and profits. Villa Riviera Inc., the record owner, defaulted in payment of installments of principal and taxes, and plaintiff elected to declare the note due. The plaintiff filed a court action for possession of the property, and for the rents, issues and profits and the same day the court appointed a Receiver. Thereafter the Receiver collected the rents for over four months at which time the court ordered the Receiver to deliver possession of the premises to the plaintiff. The plaintiff, subsequent to filing of this action caused the property to be sold under the trust deed and likewise foreclosed the chattel mortgage. Plaintiff purchased the property, leaving a substantial deficiency. Subsequent to the date of sale, the Villa Riviera Inc., was adjudicated a bankrupt and the defendant was appointed trustee. The dispute in this case is whether the moneys in the hands of the Receiver should be paid to respondents to apply upon the balance due, or should be paid to the

appellant, Trustee in Bankruptcy. The appellant contends (1) the exercise of power of sale under trust deed terminates right of beneficiary to rents collected by the Receiver pending the sale, and (2) that when the right of collection and possession is granted in such a deed of trust and chattel mortgage to the beneficiary or receiver upon default, such right does not include rents accrued, but unpaid, at time of default and demand therefor. The court held that the California Supreme Court in the four consolidated cases of *Hatch v. Security-First National Bank*, 19 Cal. (2d) 254, answered appellant's point by holding that a creditor in proceeding against additional security was not securing a personal judgment, nor a deficiency judgment.

The court, in the said case of *Mortgage Guarantees Company v. Sampsel*, said, at pages 186, 187, 188, 189 and 190:

“There can be no question but that the assignment of rentals in the deed of trust constituted additional primary security with the real property described in the deed of trust and the personal property described in the Chattel Mortgage. (*Title Guarantee & Trust Co. v. Monson*, 11 Cal. (2d) 621). But even if these rentals did not constitute additional security, the action brought for them was not an action to obtain the money judgment mentioned in Section 580a, nor was the order of the court requiring them to be paid to the respondent a deficiency judgment in the sense in which it is used in Section 580b. Therefore, in no event would the sale under the deed of trust of the real property therein described prevent the creditor from proceeding to foreclose his chattel mortgage and to obtain the rentals which in the deed of trust were assigned to him for security.”

"The general rule on the question of who is entitled to rents of mortgaged real property is set forth in 41 C. J. page 632, 'Unpaid rents accrued prior to taking appropriate steps to subject them, unless conveyed to the mortgagee by a valid assignment or expressly pledged to the mortgagee, belong to the mortgagor, but there is authority to the contrary.'

"The general rule, too, upon the question of whether the pledge in the mortgage of the rents, issues and profits for the security of the mortgaged debt refers to prior accrued rents is set forth in *Re Clark Realty Co.* 234 Fed. 576 (148 C. A. 342) at page 583, where the court says, 'As to the claim of the mortgagees to the rents and profits: The Referee held that these rents belonged to the mortgagees from the time when by intervening petitions they claimed them, but denied their rights to them prior to the date of the claim. Much of the brief of counsel for the mortgagees is devoted to the proposition that the clause in the mortgages including with the property mortgaged 'all the rents, issues and profits issuing and to issue out of said premises,' is valid. There can be no question as to the validity of this clause. The question is as to its effect. This clause in the mortgage did not give the mortgagees an absolute right to the rents. Until there was a default and until the mortgagees made some claim or demand for the rents, they belonged to the mortgagor. Until the mortgagee takes some steps to *sequester* the rents he is not entitled to them. 'Ordinarily the mortgagor is entitled to rents and profits accrued up to the time that the mortgagee enters, or brings his right of entry or his bill to foreclose, and this right inheres in a trustee in bankruptcy. (Citing cases.) Under these authorities the decision of the referee and the district court giving to the mortgagees the rents from and after the time

they made claim for them and denying the rents accruing prior to such claim was correct'."

"The general rule is followed by the California Courts is shown in Bank of America v. Bank of Amador, 135 Cal. App. 714, at page 721: ('The fact that the rents, issues and profits of the mortgaged property are expressly pledged for the security of the mortgage debt, with the right in the mortgagee to take possession upon default, does not entitle the mortgagee to the rents and profits until he takes actual possession or until actual possession is taken in his behalf by a Receiver. (Simpson v. Ferguson, 112 Cal. 180 . . .) Thus, the fact that in the instant case the trust deed purported to include the rents, issues and profits as security would not avail, unless the trustees were in actual possession at the time of the execution of the Chattel Mortgage belonging to the plaintiff.' To the same effect, Binney v. San Dimas Lemon Assn., 81 Cal. App. 213; Casey v. Doherty, 116 Cal. App. 42; Becker v. Munkelt, 27 Cal. App. (2d) 761."

"The decision in the Monson case (11 Cal. (2d) 621), fixes the date of demand as the date upon which the mortgagee's right to the rent accrues, so it is immaterial whether thereafter a receiver is appointed or not. The mortgagee is entitled to the rents from that date on."

In the case at bar not only did the court in the first instance bar foreclosure and appoint a receiver, to collect the rents, but by the contract of January 12, 1937, as modified and amended, and its express approval of said contract, it sequestered *all of the rents issues and profits* for the bank and ordered them paid over *in full* to the bank forthwith. From the effective date of said agreement, all

of the said rents, issues and profits belonged to the bank and it was constructively in possession thereof.

In the very recent case of

Childs etc. Co. v. Shelburne Realty Co., 23 A. C. 265, (Dec. 8, 1943).

the owner of certain real property executed a ninety year lease on which the lessee subsequently erected a substantial building. The lessee to finance the building, executed a trust indenture, which expressly provided it was subject to the prior lease, under the terms of which the owner or lessor had a prior lien on buildings and improvements on the premises and rents. The trust indenture likewise created a lien on the rents in favor of the trust. The lessee defaulted on the trust indenture and the trustee under the trust indenture designated *the lessee as its agent to collect the rents, deposit the same in a special account and it was agreed that all such funds so deposited should belong to the trustee*. The owner forfeited the lease because of defaults of the lessee and claimed the rents collected by the trustee prior to the owner taking possession of the premises under and by virtue of his prior lien. *The court held that notwithstanding the prior lien of the owner of the property, the trustee's possession of the rentals was established by making the lessee its agent to collect rents and manage the property, and that the lessor's lien could not be enforced until it obtained possession of the property.* The court at page 269 said:

“Prior to the time Childs, the lessor, took possession, the bank was an assignee of some of the leases between Shelburne and its subtenants, and a lien holder in possession as to the balance of the sub-rentals. The bank's possession was established by making Shelburne its agent to collect rents and man-

age the property. (*Snyder v. Western Loan & Building Co.*, 1 Cal. (2d) 697 (37 Pac. (2d) 66); *Kershaw v. Squier*, 137 Kan. 855 (22 P. (2d) 468); *Reichert v. Guaranty Trust Co.*, 261 Mich. 315 (246 N. W. 132). There is no reason to make a distinction in this case between the bank's position as assignee and its position as lien holder in possession of the premises.”

This taking of possession by the Bank of America by making Shelburne, the lessee, its agent to collect the rents is exactly the same process used by this bank in the case at bar when it (with the consent and approval of this court) made a contract with the Trustee in Bankruptcy to collect and pay over to the bank all the rents, issues and profits of the Trust Property.

In the *Childs* case, *supra*, on page 270, the Supreme Court of California used this language:

“And until a mortgagee obtains lawful possession, the mortgagor in possession may collect the rents as they fall due. Or to put it another way, the mortgagor must actually acquire possession of the mortgaged property by consent or *lawful procedure* or must secure the appointment of a receiver in order to perfect his claim to the rents.” (Citing cases.)

And again, on page 271, the court said:

“It has been pointed out that, *in the absence of a specific agreement*, the right to rentals does not accrue until the lienor obtains lawful possession of the realty. The bank may keep the subrents it collected.”

As has been so clearly pointed out in both the Federal and State decisions cited hereinabove, the enjoining of trust deed holder or mortgagee from foreclosing its security by a bankruptcy court where the right to receive

said rentals was provided in the contract, has the effect of sequestering the rentals for the lien holder and giving it constructive possession. Also, the above cases recognize the rights of the lien holder to make a valid contract with the mortgagor to collect the rents, issues and profits for the lien holder and this, the cases hold, is *constructive possession* of the lien holder and entitles him to receive such rents, issues and profits.

In the case at bar there is no dispute of the fact that the lien holder, this bank, made an express contract with the mortgagor, the Trustee in Bankruptcy, to collect these rentals and to pay the same over to the bank *in full*. As we have repeatedly shown, the possession of the Trustee in Bankruptcy is the possession of the bank and all of these rentals belong to it.

There is one more California case which is enlightening on the issues involved in these proceedings, for in that case was involved a contract between the holders of a Deed of Trust who held also an assignment of a lease on the property and a Trustee in Bankruptcy. It is strikingly analogous to the contract in the case at bar.

It is

Steinberg v. Evans, 20 Cal. App. (2d) 124.

In this case the owner, a Mrs. Stein, entered into a lease of real property to Edwards Bros. for a mortuary. She borrowed \$60,000.00 from defendant and respondent on April 9, 1930, with which to erect the demised building and gave defendant a deed of trust on the property to secure the payment of said obligation. On June 16, 1930, Stein also, as additional security, assigned the lease to Edwards Bros. to the defendants with the right to collect the rents upon default in the payments under the Deed of Trust.

In January of 1931, the Trust Co. holding title under the said deed of trust started foreclosure proceedings by giving notice of default.

On May 18, 1931, an involuntary petition in bankruptcy was filed against Stein and thereafter a trustee in Bankruptcy was appointed.

On November 19, 1931, the defendants and respondents as holders of the Trust Deed and Assignment of the lease, entered into an agreement with the Trustee in Bankruptcy in the Stein bankruptcy matter.

This agreement provided for:

1st. A rescission of the election to foreclose the trust deed, declaring the entire amount of the debt due.

2nd. The \$60,000.00 note and trust deed was reinstated in good standing.

3rd. That the rentals payable by Edwards Bros. under said lease accrued and payable on October 15, 1931, and all thereafter falling due should be paid to the Trustee in Bankruptcy.

4th. That the said Trustee in Bankruptcy should *forthwith pay said rents to the holder of the Trust Deed, the defendants and respondents.*

5th. That out of said rents the following was to be paid by the owner of the Trust Deed:

(a) Accrued and accruing interest on the \$60,000.00 note.

(b) Installments on the note at \$2,000.00 every six months commencing April 9, 1931. All unpaid balance to mature and be payable on April 9, 1940.

6th. If property be sold by the Trustee in Bankruptcy it must be for sufficient to pay the entire indebtedness of defendants and his expenses, the note to become due and payable on any sale being made.

7th. If defendants do not get the payment of the entire rentals, they may themselves enforce payment against Edwards Bros.

8th. The note and deed of trust remained in full force and effect in accordance with the original terms, except as modified by the stipulations and agreements.

9th. That so long as rents are paid to defendants no default will be called on the said note and trust deed.

10th. The stipulation recited it was to avoid litigation and if not carried out, the parties are remitted to their former rights.

The Trustee in Bankruptcy collected from lessees certain rents and paid them over to the defendants and respondents, until on May 25, 1934, when respondents, the owners of the note and trust deed, gave notice calling due all amounts on the note and trust deed because of breach of the agreement and default in payment of taxes and interest.

Thereupon the Trustee in Bankruptcy sold the said real estate and all rights in connection therewith, but subject to the said deed of trust, the lease and its assignment to one S. H. Steinberg, Trustee, for \$350.00 obviously not enough to pay off the indebtedness due defendants and respondents, and hence a breach of its agreement or stipulation. Steinberg Trustee then, on or about June 20, 1934, filed suit to enjoin the respondents from selling the property under said deed of trust, and the court enjoined defendants by judgment on September 20, 1934. During

the pendency of said suit respondents filed a new Notice of breach and Intention to sell and recorded the same on September 1, 1934.

On November 7, 1934, Steinberg filed the present action to enjoin respondents from foreclosing and for an accounting for rents collected and turned over to the respondents under the agreement or stipulation with the Trustee in Bankruptcy on the Steinberg bankruptcy matter.

The court rendered judgment against the plaintiff for an injunction and approved the accounting of respondents as being strictly in accordance with the said contract between said Trustee in Bankruptcy and the respondent, holders of the Deed of Trust and assigned lease. The contention of the plaintiff that certain rentals accruing prior to the date of the recording of the second Notice of Default and intention to foreclose belonged to the plaintiff as owner of the property, was not sustained.

This decision is based upon the holding of the validity of such a contract as was made with a Trustee in Bankruptcy by the terms of which he collected rentals and *forthwith turned them over in full* to the trust deed holder.

The analogy to the contract in the proceeding at bar is striking. Each sequestered the entire rentals of the encumbered property for the lienholder by allowing the Trustee in Bankruptcy to collect them with a covenant to forthwith pay them over to the lienholder in full. The consideration was largely the same, to-wit: the abandonment of foreclosure proceedings, the reinstatement of the deed of trust and giving of easier terms of payment. So long as the trustee held title to the property he paid over the rents to the defendants.

The cases herein cited recognize that the holder of a mortgage or trust deed note with a pledge of the rents, issues and profits has a vested estate in the subject of its security. This vested security may not be taken from it, as the Court's order does, in payment of expenses of administration without the consent of the secured creditor. Income taxes are but an expense of the Trustee in Bankruptcy and cannot be paid out of income vested in the bank. This point has been ruled upon expressly by the Circuit Court of Appeals (9th Circuit) in the case of

In re Williams' Estate, 156 Fed. 934 (*cited supra*).

On page 939 the court said:

"It is true that the record in the case shows that the lienholder voluntarily came into the bankruptcy court and asked that the property covered by its liens be sold by that court. By coming into the bankruptcy court, therefore, the holder of a valid lien upon the estate of a bankrupt comes into an appropriate place and into a court amply able to enforce and protect his rights. By doing so the lienholder waives none of his rights. The enforcement of his lien in another court would entail upon the proceeds of the property upon which the lien exists the payment of the appropriate court costs, and so in the enforcement of such lien in a court of bankruptcy, the proceeds of the property of the bankrupt upon which such lien exists is properly chargeable with the costs of such court appropriate to such enforcement, *but with no other or further costs. They are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of*

the attorney for such receiver, the general fees of the trustee or those of his attorney. If so, the valid lien upon the estate of the bankrupt which the bankruptcy act expressly declares shall be unaffected by any of its provisions, might very readily be destroyed, as it would unquestionably be, should such costs equal or exceed the proceeds in cases like the present, where the aggregate amount of the valid lien exceeds the proceeds of the entire estate of the bankrupt. In line with this ruling are the cases of Stewart v. Platt, 101 U. S. 731, 739, 25 L. Ed. 816; *In re Utt*, 105 Fed. 754, 45 C. C. A. 32; *In re Prince & Walker* (D. C.), 131 Fed. 546, 552; *In re Bourlier Cornice & Roofing Co.* (D. C.), 133 Fed. 598, 963; Loveland on Bankruptcy (3rd Ed.), p. 775. See, also, Collier on Bankruptcy (6th Ed.), p. 497." (Emphasis added.)

Here the court clearly points out that to allow the expenses and losses of a business, run by the Receiver or Trustee in Bankruptcy, might well destroy the value of the creditor's lien which the Bankruptcy Act so carefully preserves. Income taxes are merely an expense incurred by the Receiver or Trustee in Bankruptcy in operating a business and clearly are not chargeable to the funds pledged to the secured creditor.

In the United States Tax Service two recent cases are digested which bear on the controversy between the United States Government and the Security-First National Bank of Los Angeles as to payment of income taxes out of the oil royalties on which the bank has a valid first and prior lien.

The first case is

United States of America et al. v. Waddill, Holland & Flinn. Inc. et al., Virginia Supreme Court of Appeals, Record No. 2733, Jan. 24, 1944, from the Corporation Court of the City of Danville.

The substance of this case is as follows:

After an assignment by a taxpayer for the benefit of his creditors, the taxpayer's lessor under a written lease levied a distress warrant on the property so transferred for accrued and future installments of rent. On the sale of the property under order of court the United States intervened to claim priority of payment of its claim for taxes and interest due from the assignor pursuant to Section 3466, R. S. The court held that under the statute law of Virginia, as construed by its courts, the landlord has a *specific and perfected lien for such rent*, which relates back to the beginning of the tenancy and not merely an inchoate lien.

Therefore, judgment was given to the landlord and against the claim of the United States.

The United States Government based its contention on Section 3466 of the Revised Statutes (31 U. S. C. A., Sec. 191) which provided that whenever any person indebted to the United States is insolvent, or whenever the estate of a deceased debtor is insufficient to pay all his debts, the debts due the United States shall be satisfied first. This priority is by the statutes declared to extend to cases where an assignment for the benefit of creditors is made with insufficient funds to pay assignor's debts and to other classes of debtors, including bankrupts.

The court comments that this statute creates no lien in favor of the United States on the debtor's property, but merely confers on the United States Government a right of priority of payment out of such property in the hands of the debtor's assignee or their representatives under conditions specified in *U. S. v. Oklahoma*, 261 U. S. 253, 67 L. D. 638. Thus the court points out that the right of priority, if any, became fixed at the date of the assignment. If other creditors were not preferred at that time their claims will be subordinate to the Government's claim.

The court pointed out that the landlord did not dispute the above principle, but contended it had, under the laws of Virginia, a *fixed and specific lien* upon the property located on the demised premises for six months' rent, and that, therefore, its lien was superior to the Federal Government's "priority."

On this point the court said:

"However, it seems to us that if before the Government's right of priority attaches, a creditor acquires a *specific and perfected lien on the property of the insolvent debtor*, the estate of the latter is, for all practical purposes, diminished to the extent of the claim secured by such lien, and the Government's right attaches only to the residue,"

and citing the following cases:

Ernst, Director, v. Guarantee Milmark, Inc., 200 Wash. 195, 93 P. (2d) at 325;

Spokane County v. U. S., 279 U. S. at p. 94, 49 S. Ct. at 325;

United States v. Knott, 298 U. S. at 548, 56 S. Ct. at 904.

The court held that under the Virginia laws the landlord had a perfected lien for the said rent and that this prior lien could not be invaded to pay the United States taxes given priority by statute.

This case but again brings out the sanctity of perfected liens, even against claims of the United States, for taxes which are given priority of payment in bankruptcy.

In the case at bar, the facts conclusively show that Security-First National Bank of Los Angeles had a valid, perfected lien on all the rents, issues and profits arising from the properties subject to their deed of trust long prior to the accrual of the income taxes for which the United States seeks payment out of the bank's security. Not only did it have a valid and perfected lien, it had a contract of sequestration, by the terms of which no part of this income except such as was voluntarily released ever became a part of the assets of the bankrupt estate. All of these rents, issues and profits were by agreement *to be paid over in full to the bank.*

The bank gave up its rights valued at hundreds of thousands of dollars as consideration for this agreement to sequester and *pay over in full* these rents, issues and profits.

The Trustee in Bankruptcy was not required to operate the bankrupt's business. He could at any time have handed the property over for foreclosure to the bank. He elected to operate the business of the bankrupt, not for the secured creditor, whose liens were no part of the estate, but for the benefit of the unsecured creditors whose debts he wished to pay. He knew when he elected to operate this property that none of the income could be used to pay his debts and expenses, including taxes (except state and county taxes) incurred by him, for he had

himself agreed, with the approval of this court, that all of such income was payable to the bank on its lien.

The fact that the bank received the royalties from the Universal lease to apply on its debt, for which they were expressly pledged prior to incurring the income tax claims, does not in any wise alter the picture. The collection of these sequestered royalties by the trustee puts them in no different category than the collection of rentals from a building, except that the royalties waste a part of the corpus of the property.

There is no difference between the lien on the property and the lien on the royalties. There was a valid, perfected lien on both and the trustee was bound to pay over in full both the proceeds from the sale of any land and any rents, issues and profits from any pledged property. Also remember that the trustee, with the approval of the court, had a valid agreement to collect these rents and pay them over in full to the bank, the consideration for such services being paid by the bank and received by the trustee in advance. If the trustee is now to be allowed to break his agreement and have his expenses paid out of the property pledged to the bank, it would appear that the bank's debt should be augmented by the amount it paid for such services, a sum in excess of \$300,000.00. The trustee should not be allowed to keep the consideration received and refuse to render the service agreed upon in the terms of the contract. After all this is a court of equity.

At this point the other case should be cited—it fits in at this point. It is

*United States Fidelity and Guaranty Co., plaintiff,
v. Triborough Bridge Authority and Joseph D.
McGoldrick, defendants, and United States of
America, intervenor* (Supreme Court, N. Y.
County, Special Term; Part III, March 31, 1944,
No. 4515, 1943; Special Term 3, March 14,
1944).

The facts of the case were as follows:

The action was instituted by plaintiff to recover the sum of \$55,611.00 out of a fund of \$108,904 held by defendant. The fund represented a final payment to Petracca & Banks Inc. under a construction contract with Triborough. The United States intervened and claimed the entire fund under a tax lien in aid of which a Notice of Levy was served June 6, 1942. The plaintiff was surety on the construction contract. Plaintiff was compelled to pay \$55,611.00 to certain contractors for labor and materials. These payments were made after notice of assessment and demand by the United States on Petracca & Banks Inc. Under the contract of surety the plaintiff had a right of subrogation to any money due the contractors if it were called upon to pay the obligation of the contractor under its contract. Having been compelled to pay certain of the contractors, it sought repayment out of funds due under the contract. The United States Government sought to step in and take all of these funds on the assessment of a tax lien against the contractor.

The court said:

"To permit the intervenor to come in at a later date and assess a tax lien for a period which includes a year prior to the making of the contract would be inequitable and improper as a matter of law. (*Prairie State Bank v. United States*, 164 U. S. 227; *Scarsdale National Bank v. U. S. Fidelity & Guaranty Co.*, 264 N. Y. 159.) Furthermore, pursuant to Section 3670 of the Internal Revenue Code, the intervenor has *only a lien upon the property and rights of the taxpayer*. In the instant case, the taxpayer's rights were *subordinate to those of the plaintiff*, and the right of the plaintiff, and the rights of the intervenor cannot rise any higher than those of the taxpayer. To permit the intervenor to have priority over the plaintiff would conflict with *common sense and good business usage and would be opposed to sound public policy which recognizes the validity of contract.*" (Emphasis added.)

This case is strikingly analogous to the case at bar. In the above case the plaintiff had a valid right of subrogation, a lien if you please, on the proceeds from the contractor's contract to repay it for money advanced for the contractor's benefit. The Government tried to invade the fund on which the plaintiff had its lien, to pay the income taxes assessed against the contractors who earned the fund.

In the case at bar the Government is trying to invade the fund pledged to the bank as security for money advanced the bankrupt and a large sum advanced the

Trustee in Bankruptcy to acquire the very property from which the oil was produced.

The claim of the Government for income taxes incurred by the Trustee in Bankruptcy cannot be given priority in the funds of the Newport Estate any more than the claim for such taxes against the contractor could be given priority against the fund in the above case.

In either case, to give such priority would be "opposed to a sound public policy which recognizes the validity of contracts," to use the language of the court in the above cited case.

We desire to direct the court's attention to Section 64a, Subdivision 4 of the Bankruptcy Act, as follows:

"*Section 64. Debts Which Have a Priority*—a. The debts to have a priority, *in advance of the payment of dividends to creditors* and to be paid in full out of bankrupt estate, and the order of payment shall be . . .

(4) Taxes legally due and owing by the bankrupt to the United States or any state or subdivision thereof; Provided, that *no order shall* be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court:

And provided, further, that, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court."

Quoting the words of Prentice-Hall Bankruptcy Service annotating said Section 64:

“Section 64 gives the rule for paying out the money arising from the bankrupt’s property which *remains* for general distribution after all special liens and encumbrances have been dealt with.”

Even as to the general assets of the bankruptcy estate, taxes due the United States Government take fourth place and this court would not be warranted in paying said taxes prior to the three general classifications granted priority over them.

Even then the statute forbids the payment of these taxes where they are in excess of the value of the interest of the estate in said properties.

In the case at bar it is, we submit, clear that there is no equity in the property for the trustee and the creditors over the bank’s lien.

Certainly, the United States Government did not show any such equity over the bank’s lien in support of its petition.

As was said in the case of

In re Tressler, 20 F. (2d) 663:

“The ‘Bankrupt Estate’ consists of property of a bankrupt diminished by valid liens.”

This case, as well as the previous cases, demonstrates that such sequestration contracts by which the trustee collects rents and pays them over forthwith in full are quite ordinary and uniformly upheld by the courts.

The Contract of January 12, 1937, as Supplemented and Modified and Approved by the Court, Does Not Provide That Oil and Gas Royalties Can Be Used to Pay Income Taxes.

Under the heading of "Disbursement of the Special Fund" the contract provides:

"Out of the Special Fund, the *Bank* shall pay all taxes, assessments, insurance, interest and other charges and expenses of trust D 7224, and not theretofore paid by the Trustee in Bankruptcy." [Tr. p. 109.]

This language limits the use of funds in the special account to payment of taxes, a charge on Trust D 7224. The only taxes a charge on Trust D 7224 were state and county taxes, a lien on the property held by the bank in said trust. Expenses of administration of the Trustee in Bankruptcy for his income taxes certainly were no charge on Trust D 7224 of which the bank is sole trustee. Under the heading "Oil Income and Its Distribution," the contract provides:

"All income from oil, in the nature of bonuses, rentals or royalties for, or from any oil lease thereon shall be collected by the bank, and shall in no event be paid over to, or collected by said Trustee in Bankruptcy." "The funds in said account shall be available to the Trustee in Bankruptcy for the purpose of making up any deficiency in the 'Special Fund' to pay interest, taxes, assessments and expenses as hereinabove provided, in order to obviate a default; provided, however, that all sums taken from the Oil Account for such purpose shall be repaid to said Oil Account from moneys thereafter coming into the

Special Fund, and not needed to pay other or additional interest, taxes, assessments or expenses then due."

The use of money in the Oil Account is expressly limited to the making up of any deficiency in the Special Fund as above provided. As above provided, the funds in the Special Account are limited to the payment of expenses, including taxes, a charge against Trust D 7224.

To hold that the contract provides for the payment of administration expenses of the Trustee in Bankruptcy which are no charge against Trust No. D 7224, or the bank as its trustee, is to distort the plain language of this contract. Please bear in mind that when this contract was supplemented and modified to permit the Trustee in Bankruptcy to collect the income, it was the express condition that all of the funds should be paid over to the bank forthwith *in full* and that while in the trustee's hands they were impressed with the bank's lien and were to be no part of the bankrupt estate.

Mr. Harpole, counsel for the United States Government, on the hearing of the Government's Petition, expressly disclaimed making the claim that the contract of January 12, 1937, authorized such payment. [Tr. p. 289.] The attorney for the Trustee in Bankruptcy in his answer to the Petition for Payment of Taxes, the basis of this suit, alleged:

"That the income taxes due United States of America for the years 1938 and 1939 are not entitled to priority over any other expense of adminis-

tration of this estate. That if United States of America is entitled to have its claim for royalties heretofore mentioned, then other expenses of administration should be paid out of the same funds on equal parity with said claim." [Tr. p. 99, par. VIII.]

Hence we see that not only does the Government claim expenses of administration, to-wit, income taxes, but the Trustee in Bankruptcy expects to ride in on the Government's coat tails to claim all the expenses of administration to be prior to the bank's claim in these rents and royalties hypothecated to the bank and sequestered for its benefit.

To allow such a spoliation of the secured creditor, we submit, would shock the conscience of the Chancellor.

The Trustee in Bankruptcy in Collecting These Sequestered Rents and Royalties From Property the Title to Which Was Held by the Bank as Trustee of Trust D 7224, Was Not Preserving the Assets of the Bankrupt Estate as That Term Is Used by the Courts.

The oil royalties collected by the Trustee in Bankruptcy from Universal Consolidated Oil Co., the lessee of the 9-acre Long Beach Harbor Lease, fall into no different category than the collection of rentals for agricultural lands of the bankrupt.

In the case of

Callahan v. Martin, 3 Cal. (2d) 110 at 123 (6), the court says:

"The royalty return which the lessee rendered to his lessor for this estate in the land is rent, or so closely analogous to rent as to partake of the incidents thereof."

In

Elsinore Oil Co. v. Signal Hill Oil Co., 3 Cal. App.
(2d) 570 at 573,

the court says:

"In mining leases the words rents and royalty are used interchangeably to convey the same meaning."

The collection of these rents and royalties cannot be termed preservation of assets as that term is used in equity. Nor was any such distinction made by this Honorable Court in its decision assessing income taxes against the Trustee in Bankruptcy.

Nor did the Trustee in Bankruptcy do anything or incur any expenses in preserving either the land of the oil lease or the oil thereunder. The lessee did all the work of preserving the oil under this property and paid a good rental for doing so. The trustee incurred no expense in obtaining the oil. He simply collected the rentals for the bank, as he had agreed to do by contract. The rentals were sequestered long before their production, to be turned over to the bank in full. Of course, the general unsecured creditors got the benefit of these rentals and royalties for they were applied in the reduction of the bank's secured indebtedness.

These income taxes incurred by the Trustee in Bankruptcy were only an expense of administration and such expenses of administration have never been held to be expenses in preserving assets of the estate.

Mr. Harpole, the Government's counsel, expressly states that:

"The claim of the Government is here as an expense of administration in this bankruptcy case."
[Tr. p. 251, par. I.]

And again:

"As I pointed out a minute ago this is an expense of administration." [Tr. p. 253.]

And again:

"I am just interested in an order directing that payment of administration expenses, particularly that the Federal income tax be paid."

Opposing counsel was quite correct in calling these taxes administration expense.

Section 64 of the Bankruptcy Act lists debts having priority of payment out of general assets of the bankrupt estate. (*U. S. Code*, Title 11, Ch. 7, Sec. 104.)

This section gives priority out of general assets of the bankrupt estate:

First, to the actual and necessary costs of preserving the estate subsequent to filing of the petition.

Second, to the filing fees of creditors in involuntary cases;

Third, to costs of recovering property reserved for the benefit of the estate of the bankrupt by creditors;

Fourth, the costs and expenses of administration.

Taxes incurred by the Trustee in Bankruptcy have uniformly been held to be merely expenses of administration as contrasted with expense of preserving assets, etc.

See Collier on Bankruptcy 14th Ed. page 2074.

Matter of Lambertville Rubber Co. Inc., C. C. A. 3rd (1940), 111 Fed. (2d) 45;

In re Clark Coal & Coke Co., 23 Am. Br. Rep. 273;

The case of Hanson v. Birch, Vol. 1. Am. Br. Rep. (N. S.) 549 at 551;

says:

"A bankruptcy proceeding is for the administration and not the dissipation of the estate. It is undertaken primarily for the benefit of general creditors, and they in general control it It may, in this case, have been reasonable and necessary to store the stock and soda fountain in the rented store until the trustee took charge and until the stock was sold, but the retention of the store for months thereafter cannot well be justified. So the reduction of the property to cash and the foreclosure of the lien resulted in benefit to the lienor, but only to the extent that it saved him the expense necessarily incident to a foreclosure in this or any other court. Where, as here, the lienor does not seek the aid of the bankruptcy court, but is proceeded against in *invitum*, he is, aside from the cost of preserving the property, just dealt with, chargeable with no costs of administration beyond the benefit to him measured by this necessary cost of foreclosure. *Gugal v. New Orleans Nat. Bank*, (C. C. A. 5th Cir.) 29 Am. Br. Rep. 160, 239 Fed. 676. No doubt can be had of the jurisdiction of the bankruptcy court to administer property found in the possession of the bankrupt and to adjudicate claims to and liens upon it as a part of the bankruptcy proceeding.

Collier on Bankruptcy, 12th Ed. p. 541. . . . Here it was the trustee who, instead of relinquishing the property to the lienor as burdensome to the estate, decided to contest the lien . . . He and those he represents must bear the cost of the error."

In the case at bar, liquidation was the purpose of the contract of January 12, 1937. If the Trustee elected not to abandon the property, but to operate a business, he must pay all the expenses without resort to incomes and property sequestered to pay the secured creditor's debt.

In re Williams, 159 Fed. 934 at 939, (Ninth Circuit), quoted from *supra*.

In the case at bar the fund from which the court has ordered these income taxes paid is no part of the bankrupt estate. The same court that now makes the order to pay taxes out of these funds from oil royalties approved the agreement heartily ten years ago and agreed to the provision that the funds were no part of the assets of the bankruptcy estate and were to be paid over in full to the bank. We submit that the positions then and now are utterly inconsistent.

This court will recall that the bank gave up rights under its Trust Deed of a value in excess of a quarter of a million dollars to obtain a liquidating contract and an unambiguous covenant sequestering all of these funds for its benefit.

This court is a court of equity, and the repudiation of the contract ten years after it was made will not be looked upon favorably, we are sure.

The Finding That the Income Tax for the Calendar Years 1938 and 1939 Was the Result of Income, the Full Benefit and Enjoyment of Which Was Had by Security-First National Bank of Los Angeles, Is Quite Unwarranted.

After all, the Contract of January 12, 1937, as supplemented and modified, was proposed by the Trustee to obtain a postponement and orderly liquidation of the property held by the bank in its Trust. This was for the benefit of the unsecured creditors. When the oil income was developed the payment thereof to the bank to apply on its indebtedness reduced the claim of the bank which had to be paid in full before the General Creditors could get anything. Every dollar collected and paid to the bank has been in reduction of legitimate secured obligations with resultant advantage to the Bankrupt Estate, and the unsecured creditors. It is for their benefit the Trustee in Bankruptcy has been working. It was for their benefit he conducted the business which gave rise to the income taxes in question. There is no logic to the claim that he should be permitted to pay his debts and expenses out of the bank's funds. At any time he could have surrendered up and abandoned the property to the bank. He elected to operate it. The taxes incurred should be paid only out of the general assets of the Bankrupt Estate of which the funds in question are no part.

We respectfully submit that we have shown that the Security-First National Bank of Los Angeles holds a first and prior lien on all rents, royalties, issues and profits, aris-

ing from the property held by it in its Trust D 7224, and that a valid contract with the trustee in bankruptcy was entered into in 1937 sequestering these funds for the bank. That by this contract, the funds became no part of the bankrupt estate and were to be paid over in full, to the bank by said trustee in bankruptcy upon receipt by him. And that while in his possession they were to be kept segregated and were earmarked for payment over to the bank.

We submit that we have shown that as to these funds the Bank was in constructive possession thereof and deemed in law to be the equitable owner thereof.

We submit we have shown that the bank agreed only to liquidation and not to the operation of the business of the bankrupt. And that if the Trustee in Bankruptcy elects to operate such a business the cost of administering such business falls on him and not on the secured creditor. That income taxes are an expense of administering the Bankrupt Estate and never are considered as expenses incurred in preserving the Bankrupt Estate.

That in operating the bankrupt's business the Trustee was working for the benefit of the unsecured creditors and any expense incurred by him therein, including income taxes, must be paid from the general assets of the Bankrupt Estate.

We submit we have shown that to take the bank's property to pay an unsecured creditor's debt, violates the state and federal Constitutions, violates the contract of January 12, 1937 as supplemented and amended and approved by

this court, and, as this court once said, such a remedy would be "harsh and inequitable."

We pray that the order appealed from be reversed and that the said Bankruptcy Court be ordered to enter its order directing the Trustee in Bankruptcy to pay over these funds in full to the bank for application on its indebtedness.

Respectfully submitted,

W. C. SHELTON and

GEORGE W. BURCH, JR.,

By W. C. SHELTON,

Attorneys for Appellant.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a
national banking association,

vs. *Appellant,*

UNITED STATES OF AMERICA and H. F. METCALF,
Trustee in Bankruptcy for the Estate of F. P.
Newport Corporation, Ltd., a corporation, bankrupt.

Appellees.

UNITED STATES OF AMERICA,

vs. *Appellant,*

H. F. METCALF, as Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., a corporation,
bankrupt, and SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES, *Appellees.*

Upon Appeals from the District Court of the United States
for the Southern District of California.

BRIEF FOR THE UNITED STATES.

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No. 11051

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a
national banking association,

Appellant,

vs.

UNITED STATES OF AMERICA and H. F. METCALF,
Trustee in Bankruptcy for the Estate of F. P.
Newport Corporation, Ltd., a corporation, bankrupt,

Appellees.

No. 11059

UNITED STATES OF AMERICA,

Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., a corporation,
bankrupt, and SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES,

Appellees.

BRIEF FOR THE UNITED STATES.¹

¹The above parties have stipulated, with the approval of this Court, that the United States may file one brief to cover both of these appeals. Prior to the stipulation, this Court ordered that these appeals be consolidated and that the record in No. 11051 be used not only in that case but also as a supplement to the record filed in No. 11059. [R. 68-69.] Accordingly, to prevent confusion, record citations herein will refer to the record in Case No. 11051, unless otherwise indicated.

PRIOR OPINIONS.

Case No. 11051.

The findings of fact, conclusions of law and order of the Referee in Bankruptcy appear in the record in this case at pp. 194-211.

The findings of fact, conclusions of law and order of the District Court [R. 343-358] are unreported.

Case No. 11059.

The order of the Referee in Bankruptcy appears in the record in this case at pp. 15-16. The findings of fact, conclusions of law and order of the District Court (No. 11059, R. 22-33) are unreported.

JURISDICTION.

On January 12, 1937, the F. P. Newport Corporation was adjudicated a bankrupt by order of the United States District Court for the Southern District of California acting under jurisdiction conferred by Section 2 of the Bankruptcy Act, as amended. Thereafter, on April 8, 1943, the District Court, in the same proceeding, and pursuant to the mandate² of this Court, allowed the claim of the United States in the sum of \$19,363.65 for income taxes for 1938 and 1939. [R. 374-376.] Pursuant to the allowance of such claim, the United States Attorney filed a petition on behalf of the United States on September 24, 1943, for an order to show cause why H. F. Metcalf,

²Mandate issued in *United States v. Metcalf*, 131 F. (2d) 677, certiorari denied, 318 U. S. 769.

Trustee in Bankruptcy for F. P. Newport Corporation, should not be directed to pay these taxes, the order to be directed to the Trustee and the Security-First National Bank of Los Angeles, as claimant of the available funds of the bankrupt estate. [R. 81-82.] Upon this order being issued [R. 194], answers thereto were filed by the bank on October 13, 1943 [R. 83-94], and by the Trustee in Bankruptcy on October 1, 1943 [R. 95-100]. After hearing, the Referee entered an order on June 6, 1944, directing payment of the above taxes. [R. 209-211.] Upon petition for review being duly filed by the Security-First National Bank of Los Angeles on July 14, 1944 [R. 214-228], the matter was heard by the District Court on November 27, 1944 [R. 343], and its order finding that the Referee did not err and directing payment of the taxes was entered February 6, 1945. [R. 358.]

Thereafter, on February 26, 1945, and within the time allowed by statute, the Security-First National Bank of Los Angeles filed notice of appeal to this Court [R. 359], pursuant to Section 24 of the Bankruptcy Act, as amended.

Case No. 11059.

Upon petition of the Trustee in Bankruptcy for authority to pay interest to the Security-First National Bank of Los Angeles out of the Trustee's special oil account and for order to show cause thereunder, hearing was held and the Referee entered an order on October 17, 1944, directing payment of such interest. [No. 11059, R. 15-16.] Petition for review of this order was filed on behalf of the

United States on November 14, 1944, and within the time allowed by statute. [No. 11059, R. 17-20.] The cause having come on for hearing, the District Court for the Southern District of California entered an order on March 6, 1945, and another on April 9, 1945, both of which affirmed the Referee's order, and directed payment of the interest; and judgment was entered on April 13, 1945. [No. 11059, R. 20, 33.] Thereafter notices of appeal to this Court were filed by the United States from these orders on May 2, 1945, which was within the time allowed by statute [No. 11059, R. 21, 34], and was pursuant to Section 24 of the Bankruptcy Act, as amended.

QUESTIONS PRESENTED.

1. In case No. 11051, whether income tax for 1938 and 1939, which this Court has already held to be due on oil and gas royalties received by the Trustee in Bankruptcy in those years, is payable out of such income as an administration expense under Section 64(a) of the Bankruptcy Act, as amended, in view of the fact that the property producing such income is subject to a deed of trust to secure a loan.
2. In case No. 11059, whether the District Court erred in directing payment of interest to the Security-First National Bank of Los Angeles, as an administration expense under Section 64(a) of the Bankruptcy Act, as amended, prior to payment of federal income taxes due for 1938 and subsequent years.

STATUTES AND REGULATIONS INVOLVED.

The applicable statutes and regulations are set out in the Appendix, *infra*, pages 1 to 3.

STATEMENT.

Case No. 11051.

The facts as found by the District Court may be summarized as follows:

About March 1, 1930, F. P. Newport Corporation, the bankrupt herein, borrowed \$760,000 from the Security-First National Bank of Los Angeles (referred to herein-after as the bank) and conveyed title to certain real property to the bank. At the same time the bank executed a written declaration of trust, now known as Trust D 7224, in which it acknowledged the conveyance of such property to it as trustee, taking such property not only as security for the above debt but for any further advances or costs incurred under the declaration of trust. [R. 344.]

Thereafter the F. P. Newport Corporation also conveyed other real property under this trust as additional security and record title to such property is now held by the bank. [R. 345.] Included in this real estate was a nine-acre tract of land for which the bank had advanced money in order to compromise the claims of various persons thereto. These advances were added to the debt owed the bank by order of the Bankruptcy Court. [R. 346.]

The declaration of Trust D 7224 provided for all proceeds from rents, leases and sales of the trust property to be paid to the Trustee (*i.e.*, the bank), which was to credit such income to a general fund, and to use it for paying costs, fees, taxes, assessments and installments on principal and interest. It was further provided that if the money available to the bank was insufficient to meet these needs, the beneficiary, by ratifying the trust would become liable for such sums. [R. 346-347.]

As the debt owed to the bank was overdue, it declared its intention to sell the property on March 29, 1935. But ten days before that date, an involuntary petition in bankruptcy was filed against the F. P. Newport Corporation, and soon thereafter H. F. Metcalf was appointed receiver of all the property, including the property to which the record title was held by the bank, as trustee. The bank was also restrained by the District Court from proceeding with the foreclosure sale. [R. 348.]

Thereafter, from time to time, up to January 12, 1937, the bank applied for leave to foreclose and sell certain real property which it held under its trust, but the court continued its restraining order. During this time extensive negotiations and conferences were held by the bank, the receiver and other interested parties looking for a method for liquidation of the property, record title to which was in the bank. These negotiations led to an agreement entered on January 12, 1937, by the bankrupt, the bank and the receiver. [R. 349.]

This agreement with subsequent modifications was approved and ratified by the District Court, and on appeal to this Court, the order of ratification was affirmed, and writ of certiorari to review such order was denied by the Supreme Court. [R. 350.]

The F. P. Newport Corporation was duly adjudicated a bankrupt on January 12, 1937, and on March 18, 1937, H. F. Metcalf was appointed trustee of the bankrupt estate. Since that time, he has been in possession of the assets of the bankrupt estate, and he has signed the agreement of January 12, 1937, and all supplements and modifications thereto upon order of the District Court. [R. 350.]

This agreement states that the debt due the bank amounted to \$1,304,918.77 and should be paid in installments as provided therein, all to be paid by September 7, 1940. [R. 350-351.] The agreement, as modified, also provides [R. 351-352]:

That while the said Declaration of Trust No. D 7224 and the contract of January 12, 1937, provide expressly that all moneys from sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring that all bankruptcy funds be accounted for by the Trustee and be disbursed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D 7224 and the Agreement of January 12, 1937, as modified hereby.

Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds or moneys so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust shall, until the indebtedness due the Bank has been paid and except as hereinafter provided, be, while in his possession impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for

application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate. No provision of said agreement of January 12, 1937, or this supplement thereto is made or entered into, directly or indirectly, for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorney of any party in interest in this bankruptcy proceeding, for services rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to any one whomsoever from the assets of this Bankrupt Estate, is in accordance with the Law, left entirely to the determination of the court having jurisdiction of this bankruptcy proceeding, unaffected by any provision, term or condition, express or implied, of said contract of January 12, 1937, or of this supplement thereto.

Thereafter, with the approval of the District Court, the Trustee in Bankruptcy, the bankrupt and the bank, as trustee under its trust, made a lease with the Universal Consolidated Oil Company, as lessee, of a portion of the real property in the bankrupt estate, the record title to which stands in the bank's name. The purpose of such lease was to produce oil and gas and such articles have been produced in commercial paying quantities. [R. 352.]

The oil and gas royalties received by the Trustee in Bankruptcy from this lease have been deposited in a special account carried in his name at the bank's head

office. These royalties were paid out by the Trustee to the bank on orders of the District Court, and with the consent of the bank, for the purpose of covering taxes assessed against the properties, cost of engineering services for checking oil and gas production on the leased property and for principal and interest owed to the bank on the debt referred to above. [R. 353.]

On July 22, 1940, the United States Collector of Internal Revenue filed a claim in these proceedings on behalf of the United States for \$19,363.65, representing the deficiency in income tax determined by the Commissioner of Internal Revenue as owing by the Trustee in Bankruptcy and the bankrupt corporation for 1938 and 1939. Objections filed by the Trustee in Bankruptcy were sustained by the District Court but, on appeal to this Court, were overruled, this Court holding that the Trustee and the bankrupt were indebted to the United States for income tax in the amount set forth in the claim. Pursuant to this Court's decision, the District Court signed an order in these proceedings on April 8, 1943, allowing the claim for income tax but no part of that claim has been paid. [R. 353-354.]

During 1938 and 1939, the bank here received \$451,851.01 from oil and gas royalties paid to it by the Trustee in Bankruptcy of which \$289,271.47 was paid on the principal of the debt owed the bank, \$97,665.88 was for interest on such debt, and the remainder for tax assessed against the property and for expense of checking production of oil and gas. [R. 354.]

The Commissioner of Internal Revenue determined that the net income in which the taxes here were assessed was \$87,066.42 for 1938 and \$30,288.99 for 1939. [R. 354.]

The Trustee in Bankruptcy does not have, and has not had, any funds with which to pay these income taxes unless the oil and gas royalties paid to him under the lease can be used for payment thereof. The bank claims the entire amount of such royalties must be paid to it without deduction. [R. 354.]

The agreement of January 12, 1937, provides in part as follows [R. 355-356]:

Disbursement of the Special Fund. Out of the Special Fund, the Bank shall pay all taxes, assessments, insurance, interest and other charges and expenses of said Trust No. D 7224 not theretofore paid by the Trustee in Bankruptcy. After payment out of said Special Fund of all current interest, taxes, assessments and Trust Expense, and after first setting aside in said Special Fund a reserve sufficient to pay all interest, taxes, assessments and Trust Expenses for one additional year, the remainder of the money in said Special Account shall be paid over to the Trustee in Bankruptcy.

* * * * *

All income from oil, in the nature of bonuses, rentals and royalties from any of the properties held by the Bank in Trust, so paid to the Bank, shall be placed by the Bank in a Special Oil Account.

The funds in said Account shall be available to the Trustee in Bankruptcy for the purpose of making up any deficiency in the "Special Fund," to pay interest, taxes, assessments, and expenses, as hereinabove pro-

vided, in order to obviate a default; provided, however, that all sums taken from said Oil Account for such purpose shall be repaid to said Oil Account from moneys thereafter coming into Special Fund and not needed to pay other or additional interest, taxes, assessments, or expenses then due.

Except as herein provided, all amounts in said accounts, shall be applied on September first and March first of each year, or on such other dates as shall be mutually agreed upon by the Trustee in Bankruptcy and the Bank, on the principal of said indebtedness and shall be considered as cash applied on the quotas of principal as hereinbefore set forth.

The Trustee in Bankruptcy had on deposit (when the District Court made its findings on February 6, 1945), in the special account carried in his name at the head office of the bank involved here, oil and gas royalties amounting to about \$21,000. [R. 356.] The Trustee also had on deposit funds representing surface rentals amounting to \$1,495.02. [R. 356.]

On the basis of these findings, the District Court reached the following conclusions [R. 356-358]:

1. The income tax for the calendar years 1938 and 1939 hereinbefore referred to was the result of the production of income the full benefit and enjoyment of which was had by the bank.
2. The properties, record title to which is held by the bank under its Trust D 7224 as security, have been administered by the Trustee in Bankruptcy by and with the consent of the bank and for its benefit.

3. These income taxes were incidental to the administration and a necessary part of the expense of operating, preserving, collecting and liquidating the properties and distributing the proceeds thereof.

4. The bank, having had the full benefit of the income which resulted in the assessment of the taxes, should pay the taxes out of that income for such taxes are a necessary cost of producing the income.

5. By the agreement of January 12, 1937, as supplemented and modified, the oil and gas royalties can be used to pay taxes including income taxes assessed against the Trustee in Bankruptcy and the bankrupt estate herein.

6. The claim of the United States for income taxes should be paid by the Trustee in Bankruptcy herein out of his special accounts and, if the funds now on deposit in these special accounts are insufficient to pay such taxes in full and interest thereon, such deficiency should be paid by the Trustee in Bankruptcy out of oil and gas royalties when and as received.

7. Since the funds then on deposit in the special accounts of the Trustee in Bankruptcy appeared to be insufficient to pay the income taxes in full and interest, it was not necessary to determine then whether oil and gas royalties paid to the Trustee in Bankruptcy herein, or surface rentals received by the Trustee, might be used to pay expenses of administration other than income taxes.

8. The Referee in Bankruptcy did not err in his order of June 6, 1944.

The District Court then ordered payment of the 1938 and 1939 income taxes due to the United States. [R. 358.]

Case No. 11059.

The facts stated above, to the extent that they are pertinent in this case, should be considered along with the following facts taken from the record in case No. 11059:

On September 7, 1944, there became due and payable, under the terms of the agreement of January 12, 1937, interest to the Security-First National Bank of Los Angeles in the sum of \$5,534.11. [No. 11059, R. 30.]

On September 13, 1944, the Trustee in Bankruptcy herein filed a petition for authority to pay such interest to the bank out of the former's special oil account and for order to show cause thereunder. Such order being issued, hearing was held by the Referee who then ordered on October 17, 1944, that the Trustee in Bankruptcy was authorized and directed to pay interest to the bank out of the above fund in the sum set out. [No. 11059, R. 15-16, 30-31.]

Petition for review of the Referee's order by the District Court was filed on behalf of the United States on November 14, 1944 [No. 11059, R. 17-20], and after hearing, the District Court affirmed the Referee's order in orders filed March 6, 1945 [No. 11059, R. 20], and April 9, 1945 [No. 11059, R. 33].

At the time the Referee's order was made directing the payment of this interest there was on deposit in the special account the sum of \$37,256.23, and at the time of the hearing of the petition on review by the District Court, there was on deposit in such account approximately \$56,000. The Trustee is receiving on account of the oil

and gas royalties, and depositing in the special account, from \$4,000 to \$5,000 a month. [No. 11059, R. 31.]

In holding as indicated in the orders referred to above, the District Court concluded as a matter of law as follows [No. 11059, R. 31-32]:

1. The obligation of the Trustee in Bankruptcy to pay, out of the funds of this bankrupt estate, interest on the secured indebtedness of the Security-First National Bank of Los Angeles was one undertaken by and with the approval of the court and in order to secure time within which to liquidate the properties held under the trust of the bank and as part of the consideration to the bank to forego the right to immediate payment of its entire indebtedness; the obligation to pay the interest is a part of the cost of administering this estate.
2. Under the terms of the agreement of January 12, 1937, as supplemented and modified, payment of the interest may be made out of the funds in the Trustee's special account carried at the head office of the bank.
3. Failure to pay the interest when due would jeopardize this entire estate, for if, by reason of the failure to pay the interest, the court should grant leave to the bank to foreclose then this property would be lost to this estate.
4. The payment of the interest to the bank would not jeopardize or prejudice the United States, as there was on deposit in the special account more than sufficient funds to pay this interest and the allowed claims of the United States.

5. The payment of interest owing the bank was for the benefit of the estate and would benefit the United States of America in that it was necessary in order to preserve for the estate the property and the oil and gas income from the royalties.

Statement of Point to Be Urged by the United States.

The Referee in Bankruptcy erred in directing payment of \$5,534.11 as interest to the Security-First National Bank of Los Angeles prior to payment of income taxes owed to the United States for 1938 and subsequent years.

Summary of Argument.

1. Upon a prior appeal, this Court held that the property of the bankrupt here was being operated by the Trustee in Bankruptcy and that the latter was liable for income tax on oil and gas royalties received under the lease of such property in 1938 and 1939. That decision constitutes the law in case No. 11051 and is a complete denial of the bank's contention that this income producing property was not a part of the bankrupt's estate. Thus the District Court correctly held that these income taxes were a part of the cost of administering the bankrupt's estate and are payable out of oil royalties.

It is well established that taxes which accrue, as did those here, during the pendency of bankruptcy proceedings are allowable under Section 64(a)(1) of the Bankruptcy Act, as amended, as part of the costs of administration, and are payable prior to claims of creditors, both secured and unsecured. It is also the general rule that such claims

may be paid in advance of the claims of valid lienholders who are entitled, under facts like those here, to recover only net profits from the operations of a trustee in bankruptcy. There is nothing in the agreement between the Trustee and the bank which precludes the application of the above rules here or which permits the latter to receive gross profits. Indeed, the agreement indicates that certain expenses are to be deducted therefrom prior to any payments on the bank's claim. Accordingly, we submit that the Government is entitled to payment of income taxes out of the oil royalties prior to payment of the bank's claim.

2. In case No. 11059, the District Court erred in approving payment of interest before payment of federal income taxes for 1938 and subsequent years. Interest is a debt just as the principal to which it accrues is a debt and should be so treated rather than as a cost of administration. The bank claims priority for its debt, and also interest thereon because of rights under a deed of trust which accrued prior to bankruptcy and under a subsequent agreement but the bank's claim cannot be given priority over a claim of the United States. This is not a case in which the payment of interest can be given precedence because of the doctrine of relation since that doctrine is not applicable to the Federal Government.

ARGUMENT.

I.

The Federal Income Taxes Due for 1938 and 1939 From the Trustee in Bankruptcy Because of His Operation of the Bankrupt Estate Are Payable as an Administration Expense Out of the Oil and Gas Royalties Received by Him in Those Years.

In Case No. 11051, the principal question relates to the fund available for the payment of federal income taxes amounting to \$19,363.65,³ and due from the Trustee in Bankruptcy for 1938 and 1939.

A. THE PROPERTY PRODUCING THE INCOME ON WHICH THE TAX WAS IMPOSED WAS A PART OF THE BANKRUPT'S ESTATE.

The basis of the bank's objection to the payment of these income taxes out of the oil and gas royalties is that the property producing such income is not a part of the bankrupt's estate. In making this contention the bank relies on a prior deed of trust to which such property is subject and on the agreements which will be referred to in more detail below. This question is largely governed by a prior appeal (*United States v. Metcalf*, 131 F. (2d) 677, certiorari denied, 318 U. S. 769), in which this Court decided that the income taxes here involved were due. These taxes are corporate income taxes, and the basis of the decision on the prior appeal was, and necessarily so, that the Trustee in Bankruptcy was *operating*

³Additional amounts are due for subsequent years. See No. 11059, R. 30.

the properties or business of the bankrupt. Of these properties, which this Court has already held were being operated by the Trustee, the bank now argues that 90 per cent were not a part of the bankrupt's estate. But the holding of this Court is a complete denial of that assertion.

There are no new facts in the instant case. Moreover all phases of the facts involved here were not only before this Court in the *Metcalf* case, *supra*, but were given careful consideration there. Thus the opinion in that case calls attention to these facts: (1) That 90 per cent of the assets of this bankrupt, consisting of several parcels of real estate, was encumbered by a trust agreement with the bank here; (2) that under a later agreement with the bank and, upon approval of the District Court sitting as a Bankruptcy Court, the Trustee in Bankruptcy was authorized to sell such property with proceeds going to the bank; (3) that inasmuch as oil wells were being drilled adjacent to two parcels of real estate, the Trustee in Bankruptcy and the bank feared oil and gas would be drained away from the bankrupt's property and so such property was leased by the Trustee with the approval of the Court for oil and gas operation; (4) that royalties received under this lease amounted to \$245,517.65 in 1938 and to \$20,133.36 in 1939; and (5) that the District Court had ordered these royalties paid to the bank to cover taxes assessed on these properties and also to pay costs of engineering services for inspection of oil and gas produced; and then to be applied on the debt owed to the bank. Upon these facts, the District Court decided that there was no income tax due because the Trustee was not

operating the property or business of the corporate bankrupt but this Court reversed that decision. In doing so, this Court pointed out that the leasing of the oil properties, the inspection of their operation and the collection of income therefrom constituted the carrying on of business of a corporate nature by the Trustee under order of the court, and within the provisions of Section 52(a) of the Revenue Act of 1938 (Appendix, *infra*). Accordingly this Court held that the Trustee in Bankruptcy was clearly operating the property of the bankrupt and so was liable for income tax on the oil and gas royalties received under the lease. Therefore the decision of this Court constitutes the law in the instant case.

In this connection it should also be noted that, even before the appeal just referred to, this Court ruled on the validity of the agreement between the bankrupt, the bank and the Trustee in Bankruptcy in 1937 and on the modifications thereto. See *In re F. P. Newport Corp.*, 98 F. (2d) 453. In sustaining the agreement, this Court held that the bankrupt estate, including the leased property which produced the income here was entirely within the jurisdiction and control of the District Court and that such court did not surrender its control by approving the agreement. Therefore this Court held, in substance, that the Trustee in Bankruptcy here was not acting, during the taxable years, merely as an agent of the bank but was the representative of all the creditors and proceeded, in operating the property of the bankrupt, under the direction of the District Court and with its approval.

We submit that this Court has previously not only fully considered the pertinent facts on this appeal but these decisions on the prior appeals preclude the holding here that the property producing the income on which the tax was imposed was not a part of the bankrupt's estate. This being so, it should certainly follow that such income is available for the payment of the income tax imposed thereon against the Trustee in Bankruptcy,⁴ and that was the ruling of the District Court [R. 357-358] from which the bank appeals to this Court.

B. THE INCOME TAXES HERE ARE ALLOWABLE AS COSTS OF ADMINISTERING THE BANKRUPT ESTATE AND ARE PAYABLE OUT OF OIL ROYALTIES PRIOR TO THE CLAIM OF THE BANK.

The District Court held [R. 357] that the income taxes here are a necessary cost in operating and administering the properties of the bankrupt. Thus such taxes are allowable under Section 64(a)(1) of the Bankruptcy Act, as amended (Appendix, *infra*), as part of "the costs and expenses of administration," which are given priority over claims covered by Section 64(a)(2), (3), (4) and (5), as well as all other claims of creditors, both secured and unsecured. From this it should be clear that in seeking to uphold the District Court's allowance of these taxes out of oil proceeds the Government is not asking that they be

⁴The taxes which are sought here are corporate income taxes. Thus the Government has not attempted to collect from the bank, as trustee under the deed of trust. Of course if the bank were in fact the owner of the income-producing property, as it claims, it would be liable for income tax. But this Court has held that the Trustee is liable for the tax and such tax will be defeated entirely unless the Government can collect from the Trustee in Bankruptcy out of royalties, which constitute practically all of the money received by him.

allowed "as taxes"⁵ under subdivision (4). While that subdivision refers to taxes, it covers only those which are legally due and owing by the bankrupt before the petition in bankruptcy is filed. But taxes which accrue during the pendency of the bankruptcy, or while a receiver or trustee is in charge, as did those here, are allowable as costs of administration under subdivision (1) and prior to payment of claims listed in subsequent paragraphs; and this is true whether the taxes are federal, state, county or city taxes. See *In re Lambertville Rubber Co.*, 111 F. (2d) 45 (C. C. A. 3d); *State of Missouri v. Earhart*, 111 F. (2d) 992 (C. C. A. 8th), certiorari denied, 311 U. S. 676; *United States v. Killoren*, 119 F. (2d) 364 (C. C. A. 8th), certiorari denied, 314 U. S. 640; *Northumberland Co. v. Philadelphia and Reading C. & I. Co.*, 131 F. (2d) 563 (C. C. A. 3d); *In re Burbank Corp.*, 48 F. Supp. 172 (S. D. Cal.); *Florida Nat. Bank of Jacksonville v. United States*, 87 F. (2d) 896 (C. C. A. 5th); and *In re Wil-Low Cafeterias*, 35 F. Supp. 965 (S. D. N. Y.). Also see *In re Humeston*, 83 F. (2d) 187, 189 (C. C. A. 2d).

Furthermore, it has been generally held that expenses, such as taxes or other charges which are connected with operation of the property of the bankrupt by a trustee in bankruptcy or are necessary to conduct its business, may be paid out of the income produced even though there is a claimant who has a lien on the property or the income

⁵It should also be clear that the Government is not relying on Section 3466 of the Revised Statutes, to which counsel for the bank refers. Thus we think that *United States v. Waddill, Holland & Flinn*, 182 Va. 351, which is cited by counsel (Br. 46), has no application here but that case was reversed on January 2, 1945. See 323 U. S. 353. As to the distinction between Section 3466 and Section 64 of the Bankruptcy Act see *United States v. Emory*, 314 U. S. 423.

therefrom or both. *Adair v. Bank of America Assn.*, 303 U. S. 350, affirming 90 F. (2d) 750 (C. C. A. 9th); *Central Hanover B. & T. Co. v. Philadelphia & R. C. & I. Co.*, 99 F. (2d) 642 (C. C. A. 3d); *In re Preble Corp.*, 15 F. Supp. 775 (S. D. Me.); *In re Lasky*, 38 F. Supp. 24 (N. D. Ala.). In other words, the right of the lien-holder or mortgagee does not attach to gross profits but to the profits remaining after the payment of administration expenses incurred in the business operated by the Trustee. See *Florida Nat. Bank of Jacksonville v. United States*, *supra*. In that case, foreclosure proceedings were stayed when reorganization proceedings in bankruptcy were instituted. Such stay was opposed by the mortgagee but the mortgaged hotel was taken over by a trustee in bankruptcy in 1935 and operated under court order. The trust agreement provided that, in the event that the property was so taken over by a trustee or receiver, the rents and profits from the property should be part of the mortgaged property and covered by the mortgage. Accordingly, it was argued there that the federal income tax, which accrued during 1935, the period that the trustee in bankruptcy operated the hotel, could not be paid out of the income produced by such operation. However, the court held that the income tax for such period was a cost of administration and was payable out of that income. Consequently only the net profits there were payable to the mortgagee.⁶

⁶It is significant that while the court in *Florida Nat. Bank of Jacksonville*, *supra*, held that the 1935 income tax should be allowed as an administration expense, it refused to reach the same conclusion as to the 1934 tax which had accrued and was owing before the hotel was taken over by the trustee. As the 1934 tax could be allowed only as a tax claim, that case shows clearly the distinction between the two kinds of tax claims.

A similar conclusion was reached by this Court in *American Trust Co. v. English*, 84 F. (2d) 352 (cited in the bank's brief, pp. 26-27). There, a cattle ranch was taken over and operated by a trustee in bankruptcy for the bankrupt, a third mortgagee of such property, and the first mortgagee petitioned the referee for an order sequestering the proceeds from such operations. Pursuant to this petition, the trustee was directed to pay the ordinary and necessary expenses of maintaining the property and the taxes which had accrued, and then to pay the remainder of the income to the first mortgagee. Subsequently, as nothing was paid to the first mortgagee, the latter asked that the impounded funds be released but the District Court directed the trustee to pay such funds to another claimant. Then upon appeal, this Court ruled that the demand of the first mortgagee and the order of sequestration had been equivalent to possession by the latter and that it should recover the fund. However, it is significant that in so deciding, this Court held that the first mortgagee was entitled to recover only the net proceeds resulting from the trustee's operations of the ranch. Thus effect was given to the referee's original order that costs of administration, including taxes, should be paid first. To same effect see *Ingels v. Boteler*, 100 F. (2d) 915, 918 (C. C. A. 9th), affirmed, 308 U. S. 57.

We do not believe there is any essential conflict in the above cases and *In re Williams' Estate*, 156 F. (2d) 934 (C. C. A. 9th), on which counsel for the bank rely (Br. 11, 18), but if there is we submit that the later decisions of this and other courts should be controlling.

Counsel for the bank also rely on *In re Tresslar*, 20 F. (2d) 663 (M. D. Ala.), in which it was stated that the estate of a bankrupt consists of his property diminished

by valid liens. However, it should be noted it was also held there that the claims of the state, county and city (lienholders there) were payable only "after the payment of all costs of administration." (P. 665.) Thus, even in that case, it was decided, notwithstanding statements about the priority of such claims, that costs of administration can be paid out of funds claimed by valid lienholders and are payable prior to the allowance of the claims of such lienholders.⁷

C. THERE IS NOTHING IN THE AGREEMENT ON WHICH THE BANK RELIES WHICH PREVENTS PAYMENT OF THE INCOME TAXES OUT OF OIL ROYALTIES PRIOR TO SATISFACTION OF THE BANK'S CLAIMS.

It seems too clear to require argument that the bank could not alter the terms of the Bankruptcy Act by agreement. But, even assuming for the sake of argument that the bank has so agreed, there is nothing in the agreement requiring that the bank be given more than net profits. That agreement was made by the bank, the bankrupt and the Trustee in Bankruptcy in 1937 and it provided, among other things, (1) that in order to enable such Trustee to pay taxes, assessments and other charges, he would be permitted to sell or lease certain parcels of the property [R. 107], and (2) that the Trustee was permitted to use rents and "profits from oil" up to a certain amount to pay taxes, expenses, assessments, etc. [R. 111]. In the first modification of that agreement, provisions were again

⁷The above claims were for taxes which had accrued prior to bankruptcy and so would be allowable under Section 64(a)(4) of the Bankruptcy Act and not as an administration expense. But the *Tressler* case is of doubtful authority as it gives tax claims precedence over wage claims, and so fails to follow the order of priority prescribed in Section 64.

made permitting payment of taxes and all receipts were to go through the Trustee's hands. [R. 118-123.] Then in a later modification, the prior agreement was amended by entirely omitting the clause which had prohibited the use of any funds received by the Trustee in Bankruptcy from being charged with the expense of administering the bankrupt estate. [R. 128-130.] Thus, from these provisions, it is clear that even the agreement and the modifications thereto (which the bank was a party to and relies on so largely) do not give it anything but net proceeds and "taxes" were to be paid before any portion of the claim of the bank.

Furthermore, it appears that not only in framing the provisions of the agreement but in its actions generally, the bank has not objected to the deduction of various expenses from gross profits with one exception that it is not willing to have federal income taxes taken therefrom. Thus local taxes have been paid out of oil proceeds as have the engineering fees for inspecting the oil operations. Attorneys' fees in connection with litigation over title to the leased property were also paid out of such proceeds with the apparent consent of the bank [R. 130] and with the approval of this Court. See *Security-First Nat. Bank v. Bank of America, etc. Assn.*, 111 F. (2d) 50, in which the bank here contended that it was entitled to gross profits and that the District Court could not allow payment of the attorneys' fees out of oil royalties. However, this Court held that there was no merit in its contention and approved payment of the attorneys' fees out of the oil proceeds.

We submit that from the foregoing the Government is entitled to receive payment of income taxes out of oil royalties prior to payment of any claim of the bank.

II.

The District Court Erred in Approving the Referee's Order Directing Payment of Interest Upon a Debt of the Bankrupt Before Payment of Income Taxes Due the Federal Government.

In Case No. 11059, the sole question is whether the Referee properly directed the payment of interest (which became due on September 7, 1944) in the sum of \$5,534.11 to the bank here on the debt owed by the bankrupt before payment of income taxes⁸ due the Federal Government had been paid. It is the position of the Government that income tax which accrues during the pendency of a bankruptcy proceeding, as did the tax here, is allowable as an expense of administration but that the interest upon any debt owed by the bankrupt, even a secured one, is still only a debt or an accretion to a debt, and so is not entitled to priority under Section 64 (a) of the Bankruptcy Act over income tax. Moreover it is the general rule that after the property of an insolvent passes into the hands of the court, interest is not allowable against his estate for the delay in distribution is the act of the law and a necessary incident of the settlement of the estate. *State of Missouri v. Earhart*, 111 F. (2d) 992, 996 (C. C. A. 8th), certiorari denied, 311 U. S. 676.

The bank claims the right to payment of current interest because of its deed of trust and the subsequent agreement it made with the Trustee in Bankruptcy and the bankrupt

⁸Such taxes for 1938 and subsequent years were estimated in April, 1945, as amounting to \$65,000. The taxes for 1938 and 1939 have been allowed and amount to \$19,363.65. [No. 11059, R. 82.] But those for subsequent years have not yet been allowed as far as we know. Apparently the Trustee is withholding action on such taxes pending outcome of the appeals in those cases.

in 1937. Under such circumstances, current interest is sometimes allowable to private individuals. That is because of the doctrine of relation but such doctrine is not applicable in cases where the United States is the contesting claimant. *New York v. Maclay*, 288 U. S. 290. Therefore the bank's claim for interest was improperly allowed.

Conclusion.

The decision of the District Court in No. 11051 is correct and should be affirmed, but the decision in No. 11059 is erroneous and should be reversed.

Respectfully submitted,

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Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
LOUISE FOSTER,

Special Assistant to the Attorney General.

CHARLES H. CARR,
United States Attorney.

E. H. MITCHELL,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue.

October, 1945.

APPENDIX.

Bankruptcy Act of 1898, c. 541, 30 Stat. 544:

SEC. 64 [as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840]. *Debts Which Have Priority.*

—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery, the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost

and expense of one or more creditors, or where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under this Act, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: *Provided, however*, That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

* * * * *

(11 U. S. C. 1940 ed., Sec. 104.)

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 52. CORPORATION RETURNS.

* * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in

the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

Art. 52-2. *Returns by receivers.*—Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must make returns of income for such corporations. If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for the purposes of liquidation. Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee, subject to the order of the court, such receiver, trustee, or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control. * * *

Nos. 11051 and 11059.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
a national banking association,

Appellant.

vs.

UNITED STATES OF AMERICA, and H. F. METCALF,
Trustee in Bankruptcy for the Estate of F. P. NEW-
PORT CORPORATION, LTD., a corporation, bankrupt,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., a corporation,
bankrupt, and SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES,

Appellees.

Upon Appeals from the District Court of the United States
for the Southern District of California.

Brief of H. F. Metcalf as Trustee in Bankruptcy of
F. P. Newport Corporation, Ltd.

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F. P. Newport Corporation, Ltd.

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Nos. 11051 and 11059.

IN THE

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Appellees.

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Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., a corporation,
bankrupt, and SECURITY-FIRST NATIONAL BANK OF
LOS ANGELES,

Appellees.

Brief of H. F. Metcalf as Trustee in Bankruptcy of
F. P. Newport Corporation, Ltd.

Opening Statement.

As stated in the brief filed for the United States, the
appeal of Security-First National Bank of Los Angeles, a

national banking association in case No. 11051 and the appeal of the United States in case No. 11059 were by order of Court consolidated.

By stipulation entered into between the parties, it was agreed (a) that the record in case No. 11051 might be considered as a supplement to the record in case No. 11059 for the purpose of appeal of the United States in the latter case, (b) that the United States would file but one brief, (c) that the brief filed by the United States would be considered an answering brief in case No. 11051 and an opening brief in action No. 11059, and (d) that the appellee H. F. Metcalf, as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., would have the usual time to file an answering brief insofar as the appeal in case No. 11059 was concerned. This brief is filed by said Trustee in Bankruptcy only for the purpose of answering the brief filed by the United States in case No. 11059. The said Trustee in Bankruptcy is taking no part in the appeal presented by Security-First National Bank of Los Angeles in case No. 11051.

The question of jurisdiction is covered by the Government in its brief so that there would be no purpose in our referring thereto in this brief. The only question that is presented in case No. 11059 is WHETHER OR NOT THE DISTRICT COURT ERRED IN DIRECTING THAT PAYMENT OF AN INSTALLMENT OF INTEREST IN THE SUM OF \$5,534.11 BE MADE TO SECURITY-FIRST NATIONAL BANK OF LOS ANGELES.

Statement of Facts in Case No. 11059.

The United States does not challenge the Findings of Fact made by the District Court [found on pp. 22-31, incl., in the Record in case No. 11059], but merely challenges the direction or Order of the Court based on those Findings.

The facts as disclosed by the Findings may be briefly summarized for the purpose of this appeal as follows: Prior to adjudication in bankruptcy of F. P. Newport Corporation, Ltd., proceedings had been instituted by Security-First National Bank of Los Angeles for foreclosing its trust and selling the properties pursuant thereto, in order to liquidate an indebtedness owing to said Bank in excess of \$1,350,000; the properties covered by the trust constituted in excess of 90% of the assets of the bankrupt estate; an involuntary proceeding in bankruptcy was instituted; the said Bank was restrained from proceeding with said foreclosure; H. F. Metcalf was appointed Receiver; after considerable negotiations an agreement was entered into between the Receiver, the alleged Bankrupt, and the said Bank providing for liquidation of the properties covered by the said trust and payment of the indebtedness owing to said Bank; on execution of said agreement the corporation was adjudicated a bankrupt; among other things, the said agreement provided for payment by the Trustee in Bankruptcy of interest on unpaid principal of the indebtedness owing to said Bank at the rate of 4% per annum (rather than 7% per annum, the original trust rate), and the said agreement, as supple-

mented and modified, was approved by the Referee in Bankruptcy, the District Court, and this Court. (*In re F. P. Newport Corporation, Ltd.*, 98 Fed. (2d) 453.) Pursuant to said Order, the Trustee in Bankruptcy executed said agreement as so supplemented and modified. [R. 23-24.]

The Supplemental Agreement provided, among other things, in reference to payment of interest, as follows:

"It is agreed that interest on said principal sum of \$1,270,451.12, as provided in said agreement, up to August 1, 1937, together with the sum of \$9,120.06 advanced for taxes on April 16, 1937, with interest thereon at 4% per annum from the date of such advance, to August 1, 1937, shall be added to the said sum of \$1,270,451.12, and thereafter bear the same interest as said sum. It is agreed that the said sum, augmented by said above mentioned amounts, is as of August 1, 1937, the sum of \$1,304,918.77. Said sum shall bear interest at the rate of 4% per annum from August 1, 1937, payable as follows:

Interest Payment Extended

The first installment of said interest thereon shall be paid on or before March 7, 1938. Thereafter said interest shall be paid quarterly from March 7, 1938. If any installment of interest be not so paid, it shall bear like interest as the principal." [R. 119, Case No. 11051.]

Subsequent to the making of the agreement and approval thereof by the Court, an oil and gas lease was entered into between the said Bank, Trustee in Bankruptcy, and Bankrupt, as Lessors, and Universal Consolidated Oil Company, as Lessee, pursuant to which certain prop-

erties of the Bankrupt (title to which was held by said Bank as security as previously stated) were leased to said Lessee for production of oil and gas; thereafter oil and gas were discovered on said premises, and royalties have been paid on account thereof to the Trustee in Bankruptcy [R. 26-27]; and the said royalties as received were deposited by said Trustee in Bankruptcy in a special oil account carried in his name at the head office of said Bank.

From time to time thereafter but prior to the filing of the petition and order to show cause concerning payment of this particular installment of interest, said Trustee in Bankruptcy paid, out of said special oil account, interest to said Bank as it matured. [R. 29.] On June 6, 1944, the Referee made an Order that income taxes for the years 1938 and 1939 amounting to \$19,363.65 should be paid by said Trustee in Bankruptcy from said special oil account. [R. 194-211, Case No. 11051.] Therefore, the Trustee in Bankruptcy being uncertain as to whether or not an interest installment of \$5,534.11 due and payable on September 7, 1944, should be paid out of said special oil account during the pendency of the appeal prosecuted by the said Bank from the said Order directing payment of said income taxes (the correctness of which Order is involved in appeal of case No. 11051), filed a petition for instructions. Upon hearing of said petition, an Order was made directing said Trustee in Bankruptcy to pay said interest out of said special oil account; and, upon a review, the said Order was affirmed by the District Court and is the Order appealed from by the United States. [R. 22-23.] (References are to the Record in case No. 11059 unless otherwise noted.)

ARGUMENT.

It is obvious that there is no merit to the contention of United States that the interest due and owing to said Security-First National Bank of Los Angeles could be paid only if it were proper to make principal payments on account of the indebtedness owing to said Bank. It appears from an examination of the agreement of January 12, 1937, as supplemented and modified, that payment of interest to Security-First National Bank of Los Angeles was to be made by the Trustee in Bankruptcy during the period of administration. Payment of interest to the Bank was to be made currently as it matured, in quarterly installments, and was part of the consideration moving to said Bank for executing the said agreement and waiving its right to immediately foreclose under the terms of its trust, thus permitting liquidation of the properties in accordance with the said agreement over a period of years.

This Court has held that the Trustee in Bankruptcy herein was operating the business or properties of the said Bankrupt. (See *Metcalf, etc. v. United States of America*, 131 Fed. (2d) 677.) Part of the expense incident to such operation or the continued right of said Trustee in Bankruptcy to maintain, occupy and use these properties was payment of the current interest owing to said Bank. Consequently, it was like any other expense incurred by said Trustee in Bankruptcy and was payable as an expense of administration. The Bank expressly provided that oil funds could be used for payment thereof. And, in approving the said agreement of January 12, 1937, as supplemented and modified, the Court authorized payment thereof out of oil moneys.

Generally, all current expenses incurred by a Trustee in Bankruptcy during course of administration such as local

taxes on the land used by him as such Trustee in Bankruptcy, wages of employees of such Trustee in Bankruptcy, public utility charges, rent and all other charges incident to the maintenance or operation of the property conducted by such Trustee in Bankruptcy are expenses of administration within the meaning of the Bankruptcy Act. (See: *North Umberland Co. v. Philadelphia & Reading R. R. Co.*, 131 Fed. (2d) 563; *Lockhart v. Garden City Bank & Trust Co.*, 116 Fed. (2d) 658; *In re Pattee*, 143 Fed. 994; *In re Burbank Corporation*, 48 Fed. (Supp.) 172; *Wilson v. Pennsylvania Trust Co.*, 114 Fed. 742.)

If this Court should determine in connection with the appeal in case No. 11051 that the right of Security-First National Bank of Los Angeles to the oil funds was paramount to that of United States, it is obvious that United States could have no objection to payment of this interest out of those funds, since the Bank has consented thereto. The only question, therefore, to be determined is WHETHER OR NOT UNDER THE CIRCUMSTANCES AS DISCLOSED BY THE RECORD, THE UNITED STATES IS PREJUDICED IN ANY MANNER BY THE ORDER DIRECTING PAYMENT OF THIS INSTALLMENT OF INTEREST TO SECURITY-FIRST NATIONAL BANK OF LOS ANGELES.

At the time of the hearing of this matter there was owing to United States on account of income taxes only the tax for the years 1938 and 1939, to-wit, \$19,363.65, together with interest thereon, which made a total of approximately \$25,000. In addition, there were filed but not allowed, claims on account of alleged 1940, 1941 and 1942 taxes amounting to approximately \$40,000. [R. 30.] Thus, in round figures, the total tax liability, assuming without in any way conceding that the Trustee in Bank-

ruptcy would be liable for claimed taxes of 1940, 1941 and 1942, would be \$65,000.

The United States contends that said income taxes are payable as an expense of administration. Assuming this contention to be correct, it is equally clear that such taxes are entitled to no priority in payment over other expenses of administration such as interest currently owing to the Bank.

At the time of the hearing before the District Court of the petition to review the Referee's order directing payment of such interest, there was on deposit in said special account [R. 31] \$56,000.00. Oil and gas royalties were being received at the rate of between \$4,000 and \$5,000 per month. [R. 31.] Findings were signed on April 9, 1945. [R. 33.] If \$4,000 was received for each of the months of April, May, June, July, August, September and October, there would have been received by said Trustee in Bankruptcy \$28,000.00, which added to the \$56,000.00, would make a total of \$84,000.00 in the special oil account. While it does not appear in the record, there was actually on deposit in said special oil account as of October 25, 1945, the sum of \$86,122.52. So that, if we assume the tax liability is \$65,000, it is obvious that there is plenty of money in said special oil account to pay all such tax liability which this Court might ultimately determine is payable out of said special oil account and the said interest installment of \$5,534.11. By its Conclusion IV, the Court determined as follows:

"That the payment of said interest to said Bank will not jeopardize or prejudice the United States, as there is on deposit in said Special Account more than sufficient funds to pay said interest and the allowed claims of the United States." [R. 32.]

We think it is unnecessary to prolong discussion of this matter, since it is obvious that the Court's determination was fully supported by the facts, and the United States would not be hurt or injured in any wise by payment of such installment of interest to said Bank.

Respectfully submitted,

BAILIE, TURNER & LAKE,

By NORMAN A. BAILIE and

ALLEN T. LYNCH,

*Attorneys for H. F. Metcalf, Trustee in Bankruptcy of
F. P. Newport Corporation, Ltd.*

No. 11059

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., a corporation, bankrupt, and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,

Appellees.

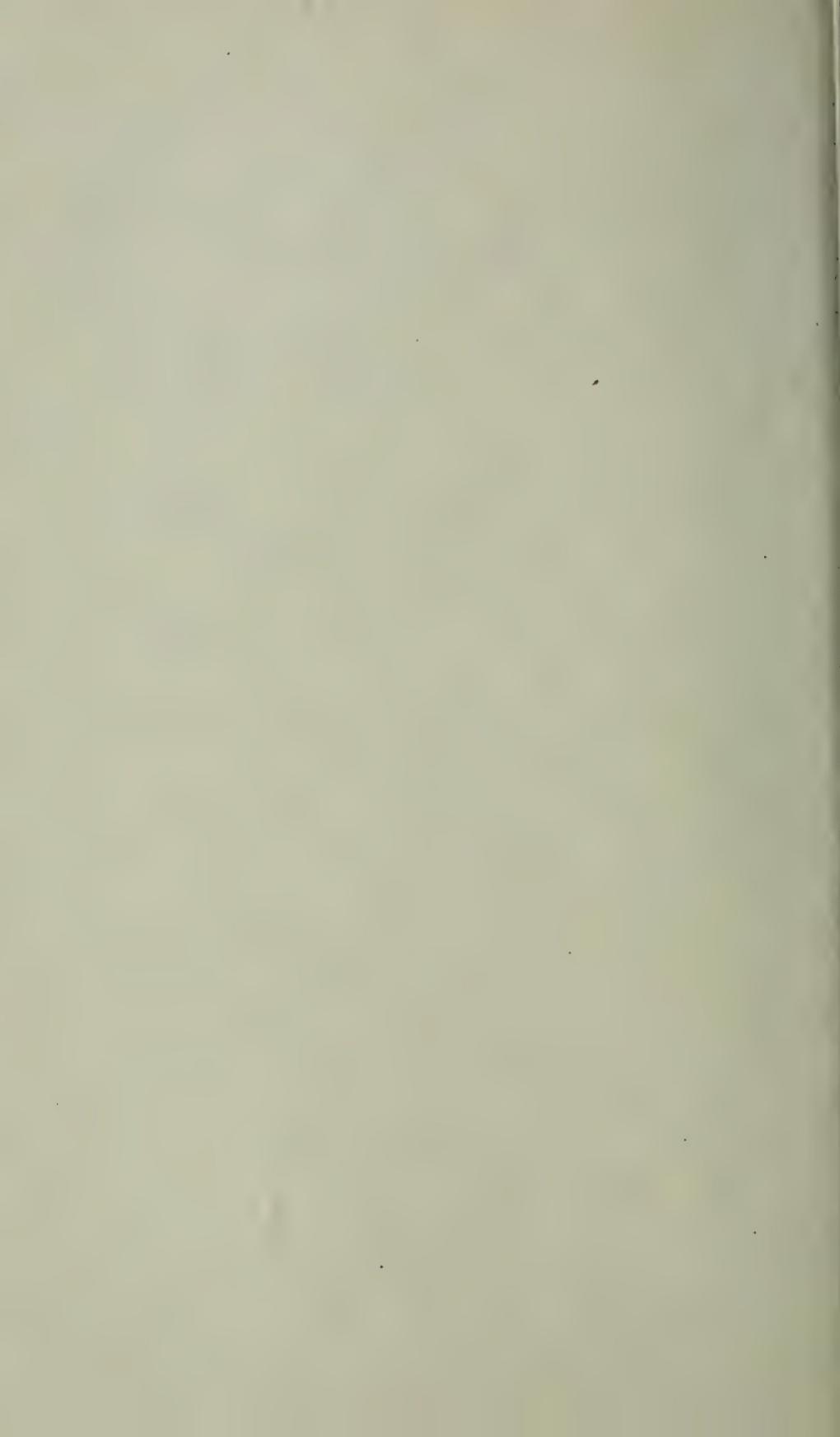
PETITION FOR REHEARING.

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No. 11059

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., a corporation, bank-
rupt, and SECURITY-FIRST NATIONAL BANK OF LOS
ANGELES,

Appellees.

PETITION FOR REHEARING.

H. F. Metcalf, as Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., one of the appellees
in the above numbered cause, earnestly petitions the Judges
of the United States Circuit Court of Appeals for the
Ninth Circuit for a rehearing of the said cause, and in
support thereof respectfully represents:

Opening Statement.

By order of the court the appeal of the Security-First
National Bank of Los Angeles in case No. 11051 and the
appeal of the United States of America in case No. 11059
were consolidated for certain purposes, as more particu-
larly disclosed by the record, and by stipulation the parties
agreed that the record in case No. 11051 might be con-
sidered as a supplement to the record in case No. 11059.

On February 13, 1946, this Court filed its opinion in case No. 11051. The last paragraph of this opinion reads as follows:

“There is no merit in appellant’s contention. The trustee’s obligation to pay taxes on income received by him from the trust property was imposed by law. The agreement of January 12, 1937, did not, nor did any modification thereof, relieve the trustee of that obligation. Taxes on income received by the trustee from the trust property were ‘expenses of administration,’ within the meaning of section 64 of the Bankruptcy Act, 11 U. S. C. A., § 104, and hence were deductible in determining what ‘moneys’ were payable to appellant by the trustee. The trustee was properly ordered to pay the taxes here involved out of income received or to be received from the trust property. The right of the United States to such payment is superior to any right of appellant in or to such income.”

On February 18, 1946, this Court filed its opinion in the above captioned cause—that is, case No. 11059. This opinion reads in part as follows:

“As indicated above, the order of October 17, 1944, in effect, directed that, before paying taxes on income received by him from the trust property, the trustee should pay the bank \$5,264.11 out of such income. Thus, in effect, it was held that the bank’s right in and to such income was superior to appellant’s right to taxes thereon. We have held otherwise. The order of October 17, 1944, should not have been applied for, granted or affirmed.”

Question Presented.

Reading the two opinions above mentioned in the light of the admitted facts, does the Court in the instant cause hold that the payment of the income tax to the Government shall have priority over payment to the bank of interest which is also an "expense of administration"?

Statement of Facts.

The facts which are essential to an understanding of the above mentioned opinions are briefly as follows:

Prior to adjudication in bankruptcy of F. P. Newport Corporation, Ltd., proceedings had been instituted by Security-First National Bank of Los Angeles for foreclosing its trust and selling the properties pursuant thereto, in order to liquidate an indebtedness owing to said Bank in excess of \$1,350,000. The properties covered by the trust constituted in excess of 90% of the assets of the bankrupt estate; an involuntary proceeding in bankruptcy was instituted; the said Bank was restrained from proceeding with said foreclosure; H. F. Metcalf was appointed Receiver; after considerable negotiations an agreement was entered into between the Receiver, the alleged Bankrupt and the said Bank, providing for termination of the foreclosure proceeding, for liquidation of the properties covered by the said trust and payment of the indebtedness owing to said Bank in installments; on execution of said agreement (January 12, 1937) the corporation was adjudicated a bankrupt. Among other things, the said agreement provided for payment by the Trustee in Bankruptcy of interest on unpaid principal of the indebtedness owing to said

Bank at the rate of 4% per annum (rather than 7% per annum, the original trust rate), and the said agreement, as supplemented and modified, was approved by the Referee in Bankruptcy, the District Court, and this Court. (*In re F. P. Newport Corporation, Ltd.*, 98 F. (2d) 453.) Pursuant to an Order, the Trustee in Bankruptcy executed said agreement as so supplemented and modified. [R. 23-24.]

The Supplemental Agreement provided, among other things, in reference to payment of interest, as follows:

“It is agreed that interest on said principal sum of \$1,270,451.12, as provided in said agreement, up to August 1, 1937, together with the sum of \$9,120.06 advanced for taxes on April 16, 1937, with interest thereon at 4% per annum from the date of such advance, to August 1, 1937, shall be added to the said sum of \$1,270,451.12, and thereafter bear the same interest as said sum. It is agreed that the said sum, augmented by said above mentioned amounts, is as of August 1, 1937, the sum of \$1,304,918.77. Said sum shall bear interest at the rate of 4% per annum from August 1, 1937, payable as follows:

Interest Payment Extended.

The first installment of said interest thereon shall be paid on or before March 7, 1938. Thereafter said interest shall be paid quarterly from March 7, 1938. If any installment of interest be not so paid, it shall bear like interest as the principal.” [R. 119, Case No. 11051.]

During the course of administration the Trustee in Bankruptcy leased a portion of the property to Universal

Consolidated Oil Company. [R. 26.] Oil and gas royalties paid to the Trustee under this lease were placed in a special account and are referred to by the Court as the "trust funds."

Pursuant to said agreement and the said order of the court directing the Trustee to sign the same and carry out its provisions, the Trustee paid each quarter thereafter current interest to said Bank out of said "trust funds" until this Court determined that the Trustee was required to pay income taxes. (See *United States v. Metcalf*, 131 F. (2d) 677.) The lower court thereafter determined that these taxes should be paid out of the "trust funds." (This Court in its opinion in case No. 11051 has affirmed the lower court.) Thereupon, and pending an appeal from the order so directing payment of said taxes out of said funds, the Trustee asked instructions from the court as to whether or not he should pay to said Bank a quarterly installment of interest then due. [R. 8-11.] The Referee directed the Trustee to pay said interest. [R. 16.]

On review the District Court affirmed the order of the Referee expressly upon the grounds that the Trustee had on hand in said trust account sufficient money to pay the taxes which the court had directed be paid, and also said quarterly installment of interest, and that therefore the Government could not be prejudiced by the payment of such interest if the order directing the payment of said taxes were affirmed by this Court. [See Findings and Conclusions of District Court, R. 22-33.]

Argument.

From the foregoing it appears clear that the current interest installment due the bank was an expense of administration. This Court has held that the taxes due the Government by the Trustee were an expense of administration. Therefore in our opinion they are of equal dignity.

All expenses of administration are expressly given equal rank and placed on a parity by the provisions of Section 64 of the Bankruptcy Act, 11 U. S. C. A. 104.

In the case of *United States v. Killoren*, 119 F. (2d) 364 (a case cited by this Court in its opinion), the court says at pages 366 and 367:

“The sole question presented by the appeal is whether or not priority may be allowed to expenses incurred in the administration of the estate by the trustee in bankruptcy over expenses including taxes, incurred during the attempted reorganization before the appointment of the bankruptcy trustee.

“The provisions of the Bankruptcy Act which control the priorities to be given in distribution of the proceeds of liquidation in bankruptcy are found in Section 64, sub. a, of the Bankruptcy Act of 1898, as amended, 11 U. S. C. A. § 104, sub. a; and 11 U. S. C. A. § 502 makes the same provisions applicable to the proceedings under Chapter X. Section 64, sub. a, names the debts which are allowed priority and gives the order of payment and it is clear that strict adherence to the provisions requires that the tax claim of the United States here involved be given equal priority with administration expenses incurred by the trustee in bankruptcy. * * *

"The same question was before the Court of Appeals of the Third Circuit in *Re Columbia Ribbon Co.*, 117 F. 2d 999, 1001, and we are in accord with the conclusions stated as follows: 'The court in determining the priority of claims against the estate is bound by the provisions of Section 64, sub. a as amended, 11 U. S. C. A. § 104, sub. a, which specify the classes of debts which are to have priority of payment over general creditors of a bankrupt estate and the order of their payment with respect to each other. Five classes of debts having priority are established. The first class includes 'the costs and expenses of administration.' Since Congress has set up no order of priority within the first class the court may not fix priorities within the class. *Missouri v. Ross*, 299 U. S. 72, 57 S. Ct. 60, 81 L. Ed. 46; *Missouri v. Earhart*, 8 Cir., 111 F. 2d 992, certiorari denied, 61 S. Ct., 43, 85 L. Ed. Consequently all administration expenses, whether incurred during the reorganization period or during the liquidation period and whether for costs and expenses or for services, must share *pro rata* in the funds available for payment."

(See also cases cited on page 7 of Trustee's brief heretofore filed herein.)

This Court in its opinion cited, in addition to the *Kiloren* case heretofore mentioned,

Central Hanover Bank & Trust Co. v. Philadelphia & Reading Coal & Iron Co., 99 F. (2d) 642;
Florida National Bank v. United States, 87 F. (2d) 896.

We respectfully submit that these last mentioned cases merely hold that expenses of administration incurred in a reorganization proceeding are to be paid out of current income derived during such administration from the mortgaged property, and only the remaining balance of such income shall be paid to the mortgagee to apply on the debt owing him by the *debtor corporation*. This Court has considered a similar question in case No. 11051, but no such question is involved in the instant cause, for here the *taxes* and the *current* interest are *debts* of the *trustee in bankruptcy*, and therefore *both* are *expenses of administration*.

In the case of *In re Lambertville Rubber Co.*, 111 F. (2d) 45 (cited by the Court in its opinion), it is said at pages 49-50:

"The trustee was authorized expressly to carry on the business of the debtor. The taxes which he incurred were inescapable if that business was to be carried on. They were therefore expenses of administration when incurred. Section 77B, sub. k(5), provides that upon entry of an order of liquidation, 'debts shall be entitled to priority as provided in section 64 (104);' We are of the opinion that the word 'debts' includes expenses of administration, which are debts incurred by the trustee. These debts of the trustee included the claim of the appellant, the taxes and all other expenses of administration. All were on a parity before the entry of the order of liquidation and they remained upon a parity after the order of liquidation was filed. All were payable as expenses of administration pursuant to the provisions of Section 64 of the Bankruptcy Act as amended."

Conclusion.

We earnestly urge that this Court grant a rehearing of this cause or make clear in a modified opinion that no priority is afforded to the income taxes over other expenses of administration.

BAILIE, TURNER & LAKE,

By NORMAN A. BAILIE,

ALLEN T. LYNCH,

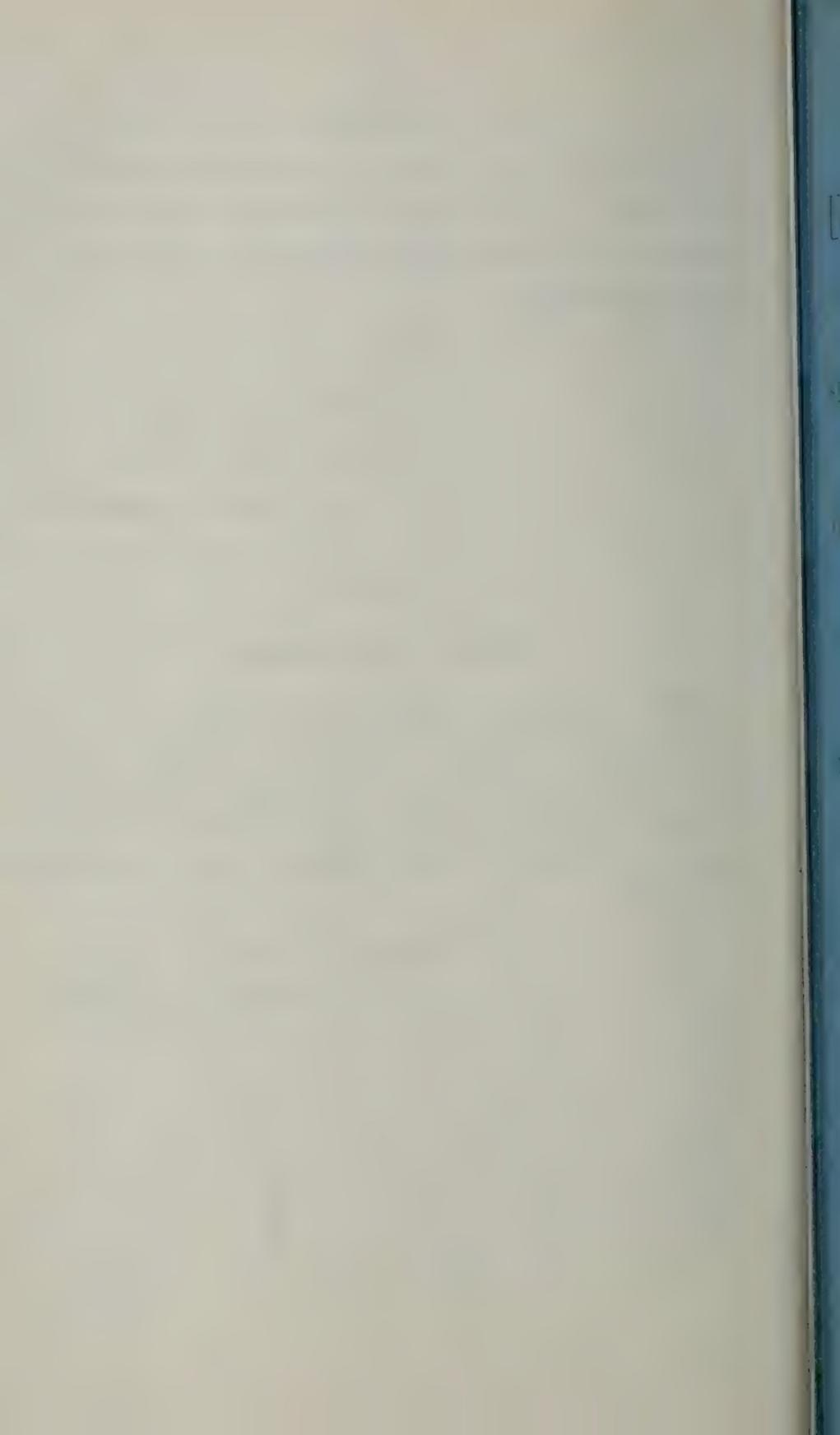
Attorneys for Appellee.

Certificate of Counsel.

Allen T. Lynch of counsel for H. F. Metcalf, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., one of the appellees, in the above entitled cause, do hereby certify that the foregoing Petition for Rehearing is, in our opinion, well founded and is not interposed for delay.

ALLEN T. LYNCH,

Attorney for Appellee.



No. 11052

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SIDNEY M. WILLIAMS,

Appellant,

vs.

CONTINENTAL INSURANCE COMPANY OF
NEW YORK, a corporation,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,

Central Division

FILED

July 3 1947

PAUL H. O'BRIEN,
CLERK

No. 11052

IN THE

**United States Circuit Court of Appeals
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NAMES AND ADDRESSES OF ATTORNEYS:

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HINDMAN & DAVIS

HUNTINGTON P. BLEDSOE

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Los Angeles 14, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

Sydney M. Williams vs.

In the District Court of the United States
Southern District of California
Central Division
No. 2738-PH

THE CONTINENTAL INSURANCE COMPANY OF
NEW YORK, a corporation,

Plaintiff,

-vs-

SYDNEY M. WILLIAMS and ELIZABETH J.
WILLIAMS,

Defendants.

COMPLAINT
(In Fraud for Money)

Plaintiff complains of defendants and alleges:

I.

That plaintiff is now and at all times herein mentioned has been a corporation organized and existing under the laws of the State of New York, and is a citizen and resident of the State of New York.

II.

That defendants, and each of them, are now and were at all times herein mentioned citizens and residents of the State of California and inhabitants of the Southern District thereof.

III.

That the above entitled cause is a suit of civil nature, wholly between citizens of different states, which can be fully determined between them, and the amount in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

IV.

That plaintiff is now and at all times herein [2] mentioned has been an insurance company, authorized to do and doing business in the State of California as an insurance underwriter of risks of loss or damage from various hazards.

V.

That on or about the 2nd day of June, 1939, plaintiff, upon the representations and warranties of defendant, Sydney M. Williams, and at his special instance and request, made, executed and delivered to the said Sydney M. Williams its policy of insurance No. IMJ-67001 wherein and whereby it insured the said Sydney M. Williams from the 2nd day of June, 1939, to the 2nd day of June, 1940, for the sum of \$4,300.00 on jewelry and/or furs against all risks of loss or damage except as therein excluded while in all situations as per schedule as follows:

<u>Item Number</u>	<u>Description of Items</u>	<u>Amount of Insurance</u>
1.	One Platinum Diamond Watch with diamond bracelet attachment containing 84 Dias. & 2 Baguettes.....	\$ 350.00
2.	One Platinum Diamond Wedding Ring with 11 Diamonds.....	\$ 50.00
3.	One Diamond friendship ring, large center with 14 smaller round stones set in platinum.....	\$ 300.00
4.	One Diamond & Emerald Bracelet set in platinum with 1 Marquise center & 74 full cut dias. weighing approx. 5 carat.....	\$ 900.00
5.	One Plat. Diam. engagement ring center stone weighing approx. 3	

VIII.

That on the 19th day of February, 1940, defendants made claim against plaintiff under each of the aforementioned policies of insurance for the payment to them of the amount of loss alleged to have been sustained by them as aforesaid, according to the terms of said policies, and in support of their said claim and demand, presented to plaintiff sworn statements in proof of their loss as claimed under each of said policies, which said statements were each signed and sworn to by each and both of said defendants; that in each of said sworn statements, defendants, and each of them, represented, alleged and swore that the hold-up occurred in the City of Calexico, California, [5] on the 31st day of December, 1939, at about the hour of 10:30 o'clock P. M., which to their best knowledge and belief was caused as follows: On said date, while they were walking on a public sidewalk in said City, an armed bandit demanded that they give him the property listed in both of said sworn statements in proof of loss and efforts toward recovery were without success; that said hold-up was not caused by design or procurement on their part; that no articles were mentioned in said sworn statements or in the annexed schedules but such as were interested in the loss and insured under said policies and belonging to them at the time of said loss; and that no property saved had been in any manner concealed; and that no attempt to deceive the said insurer, this plaintiff, as to the extent of said loss had in any manner been made.

That said representations were made in each and both of the aforesaid sworn statements; that in addition thereto, defendants represented in sworn statement presented in proof of their claim against plaintiff under Policy No. IMJ 67001, that the cash value of the articles lost by the happening aforesaid, as shown by an annexed schedule for which claim was made under said policy, was in the total sum of \$3,950.00, and that defendants' whole loss thereon was in the sum of \$3,950.00, and that defendants claimed therefor under said policy of plaintiff the amount of \$3,950.00. Attached to said sworn statement was a schedule of loss wherein there were enumerated the articles itemized as "1, 3, 4 and 5" in paragraph VII hereof, and the amounts set opposite said items, the amounts set opposite said items in said paragraph above. That in addition thereto, in the sworn statement in proof of loss to plaintiff under policy No. SPF 303653, aforesaid, defendants represented the actual amount of loss or damage to the items for which loss was claimed thereunder, as shown by the annexed schedule, was \$521.00, and said annexed schedule showed the value of the item scheduled as [6] item No. 2 in paragraph VII above as \$300.00, and the value of the item shown as item No. 6 in paragraph VII above as \$125.00, and the value of the item shown as item No. 7 in paragraph VII above as \$96.00, and made claim against plaintiff under said policy for the sum of \$300.00.

IX.

That each and all of the aforesaid representations, both oral and written, made by defendants to plaintiff were

false and fraudulent and known by defendants to be false when made, and were falsely and fraudulently and wilfully made for the purpose of deceiving plaintiff and of inducing the plaintiff to pay to the defendants the aforesaid sums in that: Defendants, or either of them, suffered *no* by hold-up or robbery or at all in the City of Calexico, California, on the 31st day of December, 1939, or at any other time or at any other place, or at all, and suffered no loss of any kind to the property insured under said policies of insurance, but on the contrary, falsely and with full knowledge of its falsity reported said alleged loss to plaintiff for the purpose of cheating and defrauding plaintiff, when in truth and in fact no robbery or hold-up had occurred at said time or place, or at all.

That the actual cost and cash value of the article itemized as item No. 1 in the schedule contained in paragraph VII hereof was in an amount of not exceeding \$100.00 instead of \$350.00, as represented by defendants; the article itemized as item No. 2 in said schedule was of a cost of and a cash value of \$150.00 instead of \$300.00 as represented by defendants; the article itemized as item No. 3 in said schedule was of a cost of and of a cash value of \$300.00 instead of \$900.00, as represented by defendants; the article itemized as item No. 4 in said schedule was of a cost of and of a cash value of \$500.00 instead of \$1,800.00, as represented by defendants; the article itemized as item No. 5 in said schedule was of a cost of \$250.00 [7] and of a cash value of \$250.00 instead of \$900.00 as represented by said defendants.

That said representations made in said sworn statements in proof of loss were false and untrue and falsely and fraudulently made by defendants with the knowledge of their falsity for the purpose of deceiving and defrauding plaintiff in that there was no robbery of the property referred to in the City of Calexico, California, on the 31st day of December, 1939, or at any other time or place, or at all, and no loss of any kind to defendants of the property described in said policies of insurance, and said report to plaintiff by defendants of said robbery or hold-up was wholly false and was reported solely for the purpose of cheating and defrauding plaintiff and inducing plaintiff to part with the sums of money aforesaid.

That said representations in said sworn statements were further false and untrue in that said alleged hold-up was reported entirely by design and procurement on defendants' part for the purpose of defrauding plaintiff; and were further false in that no articles belonging to defendants, or either of them, as mentioned in said sworn statements, were involved in any loss; and were further false and untrue in that all of the property insured was saved and concealed from plaintiff for the purpose of defrauding plaintiff; and were further false in that the entire transaction from the report of the alleged loss by hold-up or robbery, to the receipt of the aforesaid sums of money by defendants from plaintiff, and each and all of the representations so made, as heretofore alleged, were part of a false and fraudulent scheme to deceive and defraud plaintiff.

X.

That plaintiff believed the aforesaid false and fraudulent representations of defendants and had no knowledge or information to the contrary, and was induced thereby and by each of said representations, and believing said representations, [8] and acting thereon, and being induced thereby, the plaintiff did, on the 9th day of March 1940, pay to the defendants, through the Anglo-California National Bank of San Francisco, California, the respective amounts of \$3,950.00 and \$300.00, all to its damage in the sum of \$4,250.00.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of \$4,250.00, with interest thereon from March 9, 1940, and for its costs and disbursements herein.

E. EUGENE DAVIS
W. W. HINDMAN

Attorneys for Plaintiff, whose address is:
607 South Hill Street, Los Angeles,
California.

[Endorsed]: Filed Feb. 4, 1943. [9]

[Title of District Court and Cause.]

ANSWER OF SYDNEY M. WILLIAMS

Comes now defendant, Sydney M. Williams, and answering plaintiff's complaint, admits, denies and alleges:

I.

As a first affirmative defense to said complaint, this defendant alleges that said complaint does not state facts sufficient to constitute a cause of action.

Further answering said complaint and by way of a second defense to said complaint, this defendant admits, denies and alleges:

I.

Denies each and every, all and singular, the allegations contained in Paragraphs IX and X of said complaint.

Further answering said complaint and by way of a third affirmative defense, this defendant alleges: [10]

I.

That a robbery occurred on or about the 31st day of December, 1939, in the City of Calexico, State of California, and that at said time and place he was relieved of jewelry and other personal property in excess of the value of Four Thousand Two Hundred Fifty Dollars (\$4250.00); that said property was covered by insurance with the plaintiff company; that he thereafter reported said loss to the plaintiff company in accordance with the terms and conditions of the insurance policy; that all the representations made by this answering defendant were true to the best of his knowledge and belief; that thereafter the said plaintiff company caused an investigation to be made and, after being fully advised in the premises, paid to this answering defendant the sum of Four Thousand Two Hundred Fifty Dollars (\$4250.00).

Wherefore, defendant prays that plaintiff take nothing, that he recover his costs herein expended and for such other and further relief as to the Court may be deemed proper.

GEORGE PENNEY

Attorney for Defendant Sydney M. Williams. [11]

[Verified.]

[Endorsed]: Filed May 5, 1943. [12]

[Title of District Court and Cause.]

ANSWER OF ELIZABETH J. WILLIAMS

Comes now the defendant, Elizabeth J. Williams, and in answer to plaintiff's complaint on file herein, admits, denies and aledges:

I.

Answering paragraph IX of plaintiff's complaint on file herein, this answering defendant admits the allegations contained therein, but in this connection this answering defendant aledges that she did not receive any of the proceeds received from plaintiff by reason of the representations made by the defendants as set forth in plaintiff's complaint.

II.

Answering paragraph X of plaintiff's complaint herein, [13] this answering defendant admits the allegations therein contained, but denies that she received the sum of \$4,250.00, or any portion thereof, from monies paid by plaintiff to defendants in the manner set forth in said paragraph X.

Wherefore, this answering defendant prays that plaintiff take nothing by reason of its complaint on file herein against this answering defendant, and for costs of suit incurred herein, and for such other and further relief as to the Court may seem meet and proper.

CHARLES B. TAYLOR

Attorney for Defendant, Elizabeth J. Williams. [14]

[Verified.]

[Endorsed]: Filed Sep. 14, 1943. [15]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Comes now the defendant Sydney M. Williams and objects to the proposed findings of fact and conclusions of law and the proposed judgment in the above-entitled case on the following grounds:

I.

That said findings are defective in that they fail to find on a material issue raised by the pleadings and covered by the evidence; to wit, the actual value of those certain articles set forth in the proof of loss and specifically mentioned in Paragraph IX of plaintiff's complaint.

II.

That said findings are defective in that they fail to find on a material issue raised by said pleadings; to wit, whether or not this objecting defendant falsely and fraudulently represented the value of said articles. [19]

III.

That the judgment is defective in that the plaintiff had possession of certain articles of jewelry alleged to have been set forth in a proof of loss, which said loss the plaintiff paid. That it now appears that two articles of said jewelry were in the possession of the plaintiff prior to the time of commencing action; that no offer of return has been made to the defendant Sydney M. Williams; the plaintiff has exercised ownership of the same, has made no demand on said defendant for the return of any

moneys paid for said loss; and that said judgment now includes the values of the articles previously in possession of said plaintiff and no credit has been given to this defendant therefor.

GEORGE PENNEY

Attorney for Defendant Sydney M. Williams

[Endorsed]: Filed Dec. 29, 1944. [20]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on regularly for trial on the 12th day of December, 1944, before the Honorable Peirson M. Hall, Judge of the above-entitled court, sitting without a jury, a jury having been expressly waived in writing; and plaintiff appeared by its attorneys, E. Eugene Davis and Huntington P. Bledsoe, and defendant Sydney M. Williams appeared in person and by his attorney, George Penney, and defendant Elizabeth J. Williams appeared in person and by her attorney, Charles B. Taylor; and evidence, both oral and documentary, was introduced on behalf of each of the respective parties hereto, and the Court heard the same and the cause was submitted to the Court for decision, and all and singular the law and the facts having been by the Court fully considered and understood, the Court does now, on motion of plaintiff, make the following: [21]

Findings of Fact

I.

That plaintiff is now and at all times herein mentioned has been a corporation organized and existing under the laws of the State of New York, and is a citizen and resident of the State of New York.

II.

That defendants, and each of them, are now and were at all times herein mentioned citizens and residents of the State of California and inhabitants of the Southern District thereof.

III.

That the above-entitled cause is a suit of civil nature, wholly between citizens of different states, which can be fully determined between them, and the amount in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

IV.

That plaintiff is now and at all times herein mentioned has been an insurance company, authorized to do and doing business in the State of California as an insurance underwriter of risks of loss or damage from various hazards.

V.

That on or about the 2d day of June, 1939, plaintiff, upon the representations and warranties of defendant, Sydney M. Williams, and at his special instance and request, made, executed, and delivered to the said Sydney M. Williams its policy of insurance No. IMJ-67001 wherein and whereby it insured the said Sydney M. Williams

from the 2d day of June, 1939, to the 2d day of June, 1940, for the sum of \$4,300.00 on jewelry and/or furs against all risks of loss or damage except as therein excluded while in all situations as per schedule as follows: [22]

<u>Item Number</u>	<u>Description of Items</u>	<u>Amount of Insurance</u>
1.	One Platinum Diamond Watch with diamond bracelet attachment containing 84 Dias. & 2 Baguettes.....	\$ 350.00
2.	One Platinum Diamond Wedding Ring with 11 Diamonds.....	50.00
3.	One Diamond friendship ring, large center with 14 smaller round stones set in platinum.....	300.00
4.	One Diamond & Emerald Bracelet set in platinum with 1 Marquise center & 74 full-cut dias. weighing approx. 5 carat.....	900.00
5.	One Plat. Diam. engagement ring center stone weighing approx. 3 carat also containing 8 baguettes & 22 round diamonds.....	1,800.00
6.	One gents Diam. Ring measuring scant 2 carat center.....	900.00
Total.....		\$4,300.00

That on August 15, 1939, for valuable consideration, said policy was amended so as to eliminate therefrom Item No. 2 above, "One Platinum Diamond Wedding Ring" and Item No. 3 above, "One Diamond friendship ring", and to insure Sydney M. Williams and Elizabeth J. Williams in place of Sydney M. Williams.

VI.

That on the 1st day of September, 1939, plaintiff, for a valuable consideration, and upon the representations and warranties of defendants, insured defendants in an amount not exceeding \$8,000.00, on unscheduled personal property against all risks of loss or damage to the insureds' property except as therein provided by its policy of insurance No. SPF 303653, which policy provided, however, that the company, this plaintiff, should not be liable thereunder for more than \$250.00 on account of any loss of jewelry, watches and furs, and further provided that the company would not be liable for more than \$50.00 [23] on account of any one loss of money. That each and both of said policies were in full force and effect at all times herein mentioned.

VII.

That on or about the 2d day of January, 1940, defendants represented to plaintiff that on the 31st day of December, 1939, on the public streets of the City of Calexico, California, defendants suffered a loss by hold-up or robbery in that at said time and place they were deprived of the property on which they were insured in the above described policies by two armed bandits, who feloniously, and against their will, took said property from their persons by means of armed threat.

That defendants further represented to plaintiff that the articles of which they were so deprived were the articles described in said policies and the actual wholesale cost and cash value of said articles were as follows, to-wit:

1. One platinum, diamond watch with diamond bracelet attachment containing 84 diamonds and 2 Baguettes, of a cost of and a cash value of \$ 350.00

2. One diamond friendship ring, large center with 14 small round stones set in platinum, of a cost of and cash value of..... \$ 300.00
3. One diamond and emerald bracelet set in platinum with one marquise center and 74 full-cut diamonds, weighing approximately 5 carats of a cost of and cash value of \$ 900.00
4. One platinum, diamond engagement ring, center stone weighing approximately 3 carats also containing 8 baguettes and 22 round diamonds of a cost of and a cash value of \$1,800.00
5. One gent's diamond ring measuring scant 2 ct. center..... 900.00 [24]
6. One wrist watch, Gruen Curvex, yellow gold case, of a cost of and a cash value of..... \$ 125.00
7. Cash money , 96.00

VIII.

That on the 19th day of February, 1940, defendants made claim against plaintiff under each of the aforementioned policies of insurance for the payment to them of the amount of loss alleged to have been sustained by them as aforesaid, according to the terms of said policies, and in support of their said claim and demand, presented to plaintiff sworn statements in proof of their loss as claimed under each of said policies, which said statements were each signed and sworn to by each and both

of said defendants; that in each of said sworn statements, defendants, and each of them, represented, alleged and swore that the hold-up occurred in the City of Calexico, California, on the 31st day of December, 1939, at about the hour of 10:30 o'clock P. M., which to their best knowledge and belief was caused as follows: On said date, while they were walking on a public sidewalk in said City, an armed bandit demanded that they give him the property listed in both of said sworn statements in proof of loss and efforts toward recovery were without success; that said hold-up was not caused by design or procurement on their part; that no articles were mentioned in said sworn statements or in the annexed schedules but such as were interested in the loss and insured under said policies and belonging to them at the time of said loss; and that no property saved had been in any manner concealed; and that no attempt to deceive the said insurer, this plaintiff, as to the extent of said loss had in any manner been made.

That said representations were made in each and both of the aforesaid sworn statements; that in addition thereto, defendants represented in sworn statement presented in proof of their claim against plaintiff under Policy No. IMJ 67001, that the cash value of the [25] articles lost by the happening aforesaid, as shown by an annexed schedule for which claim was made under said policy, was in the total sum of \$3,950.00, and that defendants' whole loss thereon was in the sum of \$3,950.00, and that defendants claimed therefor under said policy of plaintiff the amount of \$3,950.00. Attached to said sworn statement was a schedule of loss wherein there were enumerated the articles itemized as "1, 3, 4, and 5" in paragraph VII hereof, and the amounts set opposite said items in said paragraph above. That in addition thereto, in the

sworn statement in proof of loss to plaintiff under policy No. SPF 303653, aforesaid, defendants represented the actual amount of loss or damage to the items for which loss was claimed thereunder, as shown by the annexed schedule, was \$521.00, and said annexed schedule showed the value of the item scheduled as item No. 2 in paragraph VII above as \$300.00, and the value of the item shown as item No. 6 in paragraph VII above as \$125.00, and the value of the item shown as item No. 7 in paragraph VII above as \$96.00, and made claim against plaintiff under said policy for the sum of \$300.00.

IX.

That each and all of the aforesaid representations, both oral and written, made by defendants to plaintiff were false and fraudulent and known by defendants to be false when made, and were falsely and fraudulently and wilfully made for the purpose of deceiving plaintiff and of inducing the plaintiff to pay to the defendants the aforesaid sums in that: Defendants, or either of them, suffered no loss by hold-up or robbery or loss at all in the City of Calexico, California, on the 31st day of December, 1939, or at any other time or at any other place, or at all, and suffered no loss of any kind to the property insured under said policies of insurance, but on the contrary, falsely and with full knowledge of its falsity reported said alleged loss to plaintiff for the purpose of cheating and defrauding plaintiff, when in truth and in fact no robbery or hold-up or other loss had occurred to the property insured at said time or place, or [26] at all.

That said representations made in said sworn statements in proof of loss were false and untrue and falsely and fraudulently made by defendants with the knowledge of their falsity for the purpose of deceiving and defrauding plaintiff in that there was no robbery of the property referred to in the City of Calexico, California, on the 31st day of December, 1939, or at any other time or place, or at all, and no loss of any kind to defendants of the property described in said policies of insurance, and said report to plaintiff by defendants of said robbery or hold-up was wholly false and was reported solely for the purpose of cheating and defrauding plaintiff and inducing plaintiff to part with the sums of money aforesaid.

That said representations in said sworn statements were further false and untrue in that said alleged hold-up was reported entirely by design and procurement on defendants' part for the purpose of defrauding plaintiff; and were further false in that no articles belonging to defendants, or either of them, as mentioned in said sworn statements, were involved in any loss; and were further false and untrue in that all of the property insured was saved and concealed from plaintiff for the purpose of defrauding plaintiff; and were further false in that the entire transaction from the report of the alleged loss by hold-up or robbery, to the receipt of the aforesaid sums of money by defendants from plaintiff, and each and all of the representations so made, as heretofore alleged, were part of a false and fraudulent scheme to deceive and defraud plaintiff.

X.

That plaintiff believed the aforesaid false and fraudulent representations of defendants and had no knowledge

or information to the contrary, and was induced thereby and by each of said representations, and believing said representations, and acting thereon, and being induced thereby, the plaintiff did, on the 9th day of March, 1940, pay to the defendants, through the Anglo-California National Bank of [27] San Francisco, California, the respective amounts of \$3,950.00 and \$300.00, all to its damage in the sum of \$4,250.00.

Wherefore, applying the existing law to the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

That plaintiff is entitled to judgment against defendants, and each of them, in the sum of Four Thousand, Two Hundred Fifty and no/100 Dollars (\$4,250.00), with interest thereon from March 10, 1940, and for its costs and disbursements herein.

Done in open court this 2nd day of January, 1945.

PEIRSON M. HALL

Judge of the District Court.

Approved as to form under Rule No. 7.

Attorney for Defendant Sydney M. Williams

CHARLES B. TAYLOR

Attorney for Defendant Elizabeth J. Williams. [28]

Received copy of the within Findings this 23 day of December, 1944. George Penney, Attorney for Sydney Williams.

[Endorsed]: Filed Jan. 2, 1945. [29]

In the District Court of the United States

Southern District of California

Central Division

No. 2738-PH

THE CONTINENTAL INSURANCE COMPANY OF
NEW YORK, a corporation,

Plaintiff,

vs.

SYDNEY M. WILLIAMS and ELIZABETH J.
WILLIAMS,

Defendants.

JUDGMENT

This cause came on regularly for trial on the 12th day of December, 1944, before the Honorable Peirson M. Hall, Judge of the above-entitled court, sitting without a jury, a jury having been expressly waived in writing; and plaintiff appeared by its attorneys, E. Eugene Davis and Huntington P. Bledsoe, and defendant Sydney M. Williams appeared in person and by his attorney, George Penney, and defendant Elizabeth J. Williams appeared in person and by her attorney, Charles B. Taylor; and evidence, both oral and documentary, was introduced on behalf of each of the respective parties hereto, and the Court heard the same and the cause was submitted to the Court for decision; and the Court having made its Findings of Fact and Conclusions of Law does now, on motion of plaintiff, [30]

Order, Adjudge, and Decree that judgment be entered herein in favor of plaintiff and against defendants, and each of them, in the sum of Four Thousand, Two Hundred Fifty and no/100 Dollars (\$4,250.00), with interest thereon from March 9, 1940, and for its costs and disbursements herein to be taxed by the Clerk at One Hundred Seventeen and 84/100 Dollars (\$117.84).

Done in open court this 2nd day of January, 1945.

PEIRSON M. HALL
Judge of the District Court.

Approved as to form under Rule 7.

Attorney for Defendant Sydney M. Williams

CHARLES B. TAYLOR

Attorney for Defendant Elizabeth J. Williams.

Received copy of the within Judgment this 23 day of December, 1944. George Penney, Attorney for Sydney Williams.

Judgment entered Jan. 2, 1945. Docketed Jan. 2, 1945. C. O. Book 29, page 777. Edmund L. Smith, Clerk; by J. M. Horn, Deputy. [31]

[Endorsed]: Filed Jan. 2, 1945. [32]

[Title of District Court and Cause.]

NOTICE BY CLERK OF ENTRY OF JUDGMENT

Hindman & Davis
Attorneys at Law
607 South Hill St.
Los Angeles, 14, Calif.

George Penney, Esq.
939 Rowan Bldg.
458 South Spring St.
Los Angeles, 13, Calif.

Dear Sir: In re: 2738-PH-Civil

The Continental Insurance Company of N. Y.
vs.
Sydney M. Williams, et al.

You are hereby notified that Judgment has been entered this day in the above-entitled case, in Civil Order Book No. 29, page 777.

Dated: Los Angeles, California, January 2, 1945.

EDMUND L. SMITH,
Clerk.

By J. M. Horn,
Deputy Clerk. [33]

[Title of District Court and Cause.]

NOTICE OF HEARING ON MOTION FOR NEW TRIAL, MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DIRECT THE ENTRY OF A NEW JUDGMENT, AND MOTION TO CORRECT FINDINGS AND TO MAKE THE SAME MORE DEFINITE AND CERTAIN

To the Continental Insurance Company of New York, a corporation, plaintiff in the above-entitled action, and to Messrs. Hindman & Davis and Huntington P. Bledsoe, its attorneys:

You, and Each of You, Will Please Take Notice that the defendant Sydney M. Williams in the above-entitled action is filing concurrently herewith his written motion for new trial, motion to amend findings of fact and conclusions of law and direct the entry of a new judgment, and motion to correct findings and to make the same more definite and certain, a copy of which is attached hereto, marked "Exhibit A" and incorporated herein by reference as fully as if set forth herein at length.

You Will Further Take Notice that said defendant will present said motions for hearing on the 29th day of January 1945 at the hour of ten o'clock a. m. of said day, or as soon thereafter as counsel may be heard, in the above-entitled court, in the room of Judge [34] Peirson M. Hall, Room 4, second floor of the Federal Building, Los Angeles, California.

Dated, January 11, 1945.

GEORGE PENNEY

Attorney for Defendant Sydney M. Williams [35]

[Note: Exhibit A is a copy of Motion for New Trial, etc., found at page 37 of the Certified Record so is not repeated at this point.]

[Endorsed]: Filed Jan. 11, 1945. [36]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL, MOTION TO AMEND
FINDINGS OF FACT AND CONCLUSIONS OF
LAW AND DIRECT THE ENTRY OF A NEW
JUDGMENT, AND MOTION TO CORRECT
FINDINGS AND TO MAKE THE SAME MORE
DEFINITE AND CERTAIN

Comes now the defendant Sydney M. Williams and files this his written motions as follows, to wit:

His Motion for New Trial in the Above-Entitled Matter: for the following reasons:

1. That there is newly-discovered evidence which this defendant could not, in the exercise of reasonable diligence, have discovered prior to the trial of this action.
2. That errors of law appear upon the face of the record.
3. That errors of law were committed in the admission and exclusion of evidence.
4. That it appears from the pleadings and the evidence in this case that an erroneous judgment has been rendered.
5. That it appears from the pleadings and the evidence that justice has not been attained by the judgment rendered herein.
6. That the findings of fact are not supported by the evidence. [37]
7. That the judgment is not supported by the evidence.
8. That the findings of fact are insufficient to support the conclusions of law.
9. That the findings of fact and conclusions of law are insufficient to support the judgment herein.

10. That errors occurred in the course of the trial prejudicial to this defendant.

11. That there was genuine and excusable surprise and mistake in the course of the trial, and with respect to the evidence adduced therein, adversely affecting this defendant's cause, which mistake and surprise were contributed to by the conduct of plaintiff's attorneys.

His Motion to Amend the Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment in the Above-Entitled Matter, upon the following grounds, to wit:

1. That it appears from the pleadings and the evidence in this case that the court should have found that the representations of this defendant with respect to the alleged holdup or robbery were true and correct.

2. That it appears from the pleadings and the evidence in this case that the court should have found that the actual amount of the loss or damage sustained by this defendant as claimed in his schedule of loss was true and correct.

3. That it appears from the pleadings and the evidence in this case that certain articles of jewelry involved in the holdup and introduced in evidence as the articles involved therein were not the articles listed in or covered by the policy issued by the plaintiff, nor the articles listed in this defendant's proof of loss.

4. That the judgment is defective in that the plaintiff had possession of certain articles of jewelry alleged to have been set forth in a proof of loss, which said loss the plaintiff paid. That [38] it now appears that two articles of said jewelry were in the possession of the plaintiff prior to the time of commencing action; that no offer of return has been made to the defendant Sydney

M. Williams; the plaintiff has exercised ownership of the same, has made no demand on said defendant for the return of any moneys paid for said loss; and that said judgment now includes the values of the articles previously in possession of said plaintiff and no credit has been given to this defendant therefor.

5. That the judgment in the above-entitled matter should have been in favor of this defendant.

His Motion to Correct the Findings and to Make the Same More Definite and Certain, upon the following grounds, to wit:

1. That said findings are defective in that they fail to find on a material issue raised by the pleadings and covered by the evidence; to wit, the actual value of those certain articles set forth in the proof of loss and specifically mentioned in Paragraph IX of plaintiff's complaint.

2. That said findings are defective in that they fail to find on a material issue raised by said pleadings; to wit, whether or not this defendant falsely and fraudulently represented the value of said articles.

3. Said motions, and each of them, will be based upon the files, records, documents, evidence, including the reporter's transcript, and exhibits received in evidence, and memoranda of counsel heretofore filed in the above-entitled action, and upon the affidavits of Emanuel M. Lipgett, Irving H. Laykin, David Riskin, Rosalind Goodrich Bates, and George Penney, filed concurrently herewith.

Dated, this 11th day of January, 1945.

GEORGE PENNEY

Attorney for Defendant Sydney M. Williams

[Endorsed]: Filed Jan. 11, 1945. [39]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE PENNEY

State of California

County of Los Angeles—ss.

George Penney, being first duly sworn, on his oath deposes and says:

That he is the attorney of record for the defendant Sydney M. Williams. That after service of summons and complaint upon the defendant Sydney M. Williams your affiant was retained as counsel, and immediately communicated with E. Eugene Davis, Esq. of the firm of Hindman & Davis and made arrangements to have the deposition of Sydney M. Williams taken at their office. This was accordingly done on the 28th day of April 1943. At that time service of summons and complaint had not been had on Elizabeth J. Williams, codefendant. That Elizabeth J. Williams filed her answer in October of 1943 and was represented by Charles B. Taylor, Esq. That your affiant communicated with said Charles B. Taylor and requested the opportunity [40] of taking the deposition of said Elizabeth J. Williams, as your affiant did not know the whereabouts of the said Elizabeth J. Williams. Mr. Taylor advised your affiant that he would communicate with his client and assured this affiant that the deposition could be taken sometime during the following month, as the case had been set for trial on December 30, 1943.

Shortly thereafter the case went off calendar, and nothing further was done in connection with obtaining said deposition. In the spring of 1944, your affiant again communicated with the said Charles B. Taylor and asked permission to take the deposition of said Elizabeth J.

Williams. At this time the said Charles B. Taylor advised your affiant that Elizabeth J. Williams was not in the city, but that he would communicate with her and make the proper arrangements for a deposition. Your affiant waited until sometime during the summer of 1944 and again communicated with said Charles B. Taylor and received the same reply; i. e., that he would have his client ready for a deposition and would let affiant know the time that she would be in the city.

In September, your affiant again communicated with the said Charles B. Taylor and again was advised that the deposition would be taken. The case was then set for trial on November 14, 1944, but was continued at the request of this affiant to December 12, 1944. Affiant communicated with the said Taylor the first week in November and requested again that he permit the deposition of the said Elizabeth J. Williams to be taken. On or about the 27th day of November 1944, affiant again communicated with the said Taylor and advised him that it would be necessary to take the deposition prior to the time of trial. Taylor advised this affiant that he would wire Elizabeth J. Williams and have her available for the deposition and asked what dates this affiant could take said deposition. Affiant advised him that it could be taken either Monday, December 4, December 6, December 7, or December 8. [41]

On the afternoon of December 8, the said Taylor called your affiant and stated that Elizabeth J. Williams was in his office. Your affiant requested the opportunity of taking her deposition at that time, but after communicating with Messrs. Hindman & Davis affiant ascertained that it was inconvenient for a representative of the latter firm to be present then, and the only date which was convenient for all parties concerned was Sunday,

December 10. The deposition was accordingly taken at that time, and the transcript of her testimony was transcribed and delivered to this affiant on the afternoon of December 11, the day preceding commencement of trial. That your affiant had no opportunity of checking the story of Elizabeth J. Williams until the time of trial, which proved insufficient to obtain the necessary evidence to overcome her testimony.

Affiant discussed with his client the possibility of requesting a continuance, but the said Sydney M. Williams stated that the filing of this action had hurt his credit as well as injured his professional standing and that he felt he should proceed to trial in order to clear his name.

Your affiant believes that the said Charles B. Taylor acted in good faith throughout, and that there is no fault attached to him in the failure to have his client available for the deposition.

This affiant never had the opportunity of examining the two pieces of jewelry which were offered in evidence by the plaintiff in the action until the time they were presented in court, and it now appears from the affidavits filed herein that these two exhibits were not the subject matter of the insurance as testified to by the said Elizabeth J. Williams, nor are they items referred to in the complaint of the plaintiff.

After the rendition of judgment, your affiant attempted to ascertain the name of the assistant of S. W. Thompson, the attorney for Elizabeth J. Williams in the divorce action filed by her against [42] Sydney M. Williams, to which reference was made in the course of this trial. S. W. (Pinky) Thompson is now deceased, having passed away approximately two years ago. Affiant was informed that the assistant's name was Friedman and that

he had been associated after Thompson's death with Louis Greenbaum, an attorney at law with offices in the Garfield Building in Los Angeles. Your affiant communicated with Mr. Greenbaum and he advised your affiant that the said Friedman was in the service of the United States armed forces. In that conversation, it developed that Mr. Greenbaum had been told, sometime in 1941, certain facts concerning this robbery in Calexico by Elizabeth J. Williams. Affiant outlined to Mr. Greenbaum the substance of the story told by Elizabeth J. Williams on the witness stand, and asked him whether he felt he could give an affidavit outlining the story which Mrs. Williams had told him. He refused to give an affidavit and refused to give the substance of her story to him, stating that he would be willing to do so if the court should determine that the information he so received was not confidential. He further stated in substance that he believed that his testimony would be material to a correct determination of the issues before this court. Greenbaum then stated to this affiant that he had referred the said Elizabeth J. Williams to Herbert Ganahl, an attorney at law with offices in the Merritt Building in Los Angeles.

Your affiant communicated with Mr. Ganahl and outlined to him the substance of the statements made by Elizabeth J. Williams under oath during the trial of the above-entitled action. Mr. Ganahl stated to your affiant that he could not give an affidavit until this court had determined whether such information which he had received from Elizabeth J. Williams in 1941 was confidential and whether, if confidential, the said Elizabeth J. Williams had waived the privilege of confidence. He stated that if he could be permitted to testify he would be willing to do so, and further assured this affiant that

his testimony would be of such a nature that it would [43] materially assist the court in a proper determination of the issues of this case.

Your affiant then communicated with Harry J. McClean, president of the Bar Association of Los Angeles, to ascertain what the proper procedure would be to obtain the testimony of these two attorneys at law, as your affiant considered it a question of ethics. The said Harry J. McClean suggested that the matter be called to the court's attention by way of an affidavit in this form. Your affiant verily believes that subpoenas should be issued for the said Louis Greenbaum and the said Herbert Ganahl to appear in court for the purpose of receiving their testimony.

GEORGE PENNEY

Subscribed and Sworn to before me this 11th day of January 1945.

(Seal)

NINA L. SANDERS

Notary Public in and for said County and State

[Endorsed]: Filed Jan. 11, 1945. [44]

[Title of District Court and Cause.]

AFFIDAVIT OF ROSALIND GOODRICH BATES
State of California
County of Los Angeles—ss.

Rosalind Goodrich Bates, being first duly sworn, on oath deposes and says:

That in 1940 she was a duly qualified Commissioner in domestic relations court of the County of Los Angeles

assigned to the court of the Honorable Ben Lindsey. That she recalls a hearing in said court between Sydney M. Williams and his wife Elizabeth J. Williams and the circumstances surrounding the same, as she had known the said Sydney M. Williams for many years prior thereto.

That at the time of the hearing in her department in October 1940 she is certain that both Elizabeth J. Williams and Sydney M. Williams were sworn before they testified. That the said Sydney M. Williams was making a claim for certain jewelry which consisted of a man's diamond ring and a diamond Elk's pin which the said Elizabeth [45] J. Williams admitted she had in her possession. That said Sydney M. Williams made no claim nor was any testimony offered by him or by Elizabeth J. Williams concerning any unmounted diamonds.

Affiant further states that she never requested Elizabeth J. Williams to return a two-carat or a three-carat unmounted diamond. Affiant further states that there was no mention of any robbery at the time of said hearing; that the order which your affiant made at the time should have particularly described said man's diamond ring and an Elk's pin, as those were the only two pieces of jewelry which were mentioned at the time of said hearing.

ROSALIND GOODRICH BATES

Subscribed and Sworn to before me this 10th day of January 1945.

(Seal)

DELLA G. MARGAINE

Notary Public in and for said County and State

[Endorsed]: Filed Jan. 11, 1945. [46]

[Title of District Court and Cause.]

AFFIDAVIT OF DAVID RISKIN

State of California

County of Los Angeles—ss.

David Riskin, being first duly sworn, on his oath deposes and says:

That on or about the 6th day of February 1939 he sold to Sydney M. Williams for the sum of \$500 a lady's diamond ring with a center diamond weighing between 1 carat and 1 and 10/100 carats, set with smaller diamonds. That said ring had no initials inscribed on the inside of the band.

That on or about the 5th day of January 1945 this affiant examined the lady's ring which is marked in evidence as Exhibit 8. This ring definitely is not the ring sold by this affiant to said Sydney M. Williams, as said ring has a center stone weighing approximately one-half carat. Your affiant, by the use of a jeweler's glass, has discovered two engraved initials which appear to be AT; [47] these initials are not a manufacturer's trademark.

Affiant further states that the ring which he sold to Sydney M. Williams was reasonably worth the sum of \$500 in February 1939; that the ring offered in evidence in the above-entitled case and marked "Exhibit 8" would have been reasonably worth in February 1939 between \$125 and \$150.

DAVID RISKIN

Subscribed and Sworn to before me this 8th day of January 1945.

(Seal)

NINA L. SANDERS

Notary Public in and for the County of Los Angeles,
State of California

[Endorsed]: Filed Jan. 11, 1945. [48]

[Title of District Court and Cause.]

AFFIDAVIT OF EMANUEL M. LIPPETT

State of California

County of Los Angeles—ss.

Emanuel M. Lippett, being first duly sworn, on his oath deposes and says:

That he has examined the lady's wrist watch and the lady's ring, both of which articles were introduced in evidence in the above-entitled action. That neither the watch nor the ring is an article which your affiant appraised for insurance by the Continental Insurance Company at the time said company placed insurance on the jewelry of said Sydney M. Williams.

EMANUEL M. LIPPETT

Subscribed and Sworn to before me this 10th day of January 1945.

(Seal)

BEATRICE NOYES

Notary Public in and for said County and State

[Endorsed]: Filed Jan. 11, 1945. [49]

[Title of District Court and Cause.]

AFFIDAVIT OF IRVING H. LAYKIN

State of California

County of Los Angeles—ss.

Irving H. Laykin, being first duly sworn, on his oath deposes and says:

That he knew Max Rosenthal in his lifetime and had had numerous business dealings with him. That at various times he had on consignment from the said Max Rosenthal many thousands of dollars worth of jewelry consisting largely of mounted diamonds. That in 1936 your affiant appraised two pieces of jewelry for Sydney M. Williams at the request of Max Rosenthal and Sydney M. Williams, as the said Max Rosenthal advised

your affiant that he was paying an obligation to the said Sydney M. Williams and also obtaining certain cash for the sale of two pieces of jewelry consisting of (1) one lady's diamond ring with a large center stone of approximately 3 carats surrounded by baguettes and smaller diamonds which your affiant appraised at in [50] excess of \$2000 retail; and (2) one platinum diamond watch with diamond bracelet attachment, which your affiant appraised at in excess of \$500 retail, his best recollection being that it was appraised at \$750. Your affiant knows that these two pieces of jewelry were subsequently sold to said Sydney M. Williams.

Your affiant did, on or about the 28th day of December 1944, examine a wrist watch at the United States Clerk's office which your affiant was informed had been offered in evidence in the above-entitled case. That your affiant is certain that the watch offered in evidence is not the watch which said Max Rosenthal sold to said Sydney M. Williams. Your affiant further states that he never would have appraised said watch in 1936 for \$750, as in his opinion said watch would have been worth in 1936 only \$125 retail.

Affiant further states that in 1937 he sold to said Sydney M. Williams a small Welson watch with a cloth band for the sum of \$55; that your affiant believes that the watch offered in evidence is either the watch sold by your affiant to said Sydney M. Williams or an identical watch to the one so sold.

IRVING H. LAYKIN

Subscribed and Sworn to before me this 8 day of January 1945.

(Seal)

EDWIN A. ISAACSON

Notary Public in and for said County and State
My Commission Expires Sept. 13, 1945

[Endorsed]: Filed Jan. 11, 1945. [51]

[Title of District Court and Cause.]

AFFIDAVIT OF HUNTINGTON P. BLEDSOE IN
OPPOSITION TO MOTION FOR NEW TRIAL

State of California

County of Los Angeles—ss.

Huntington P. Bledsoe, being first duly sworn, deposes and says:

(a) Regarding Affidavit of George Penney:

That affiant has no knowledge, information, or belief concerning the allegations in the affidavit of George Penney regarding his referred to attempts to take the deposition of the defendant Elizabeth J. Williams, or whether said George Penney obtained a subpoena and attempted to serve the said defendant Elizabeth J. Williams; that affiant is informed and believes, and therefore states, that the said defendant Elizabeth J. Williams was present within the county of Los Angeles and available for a deposition for approximately nine or ten months after the filing of the above-entitled action, and that had the said George Penney so desired he could have taken the deposition of said Elizabeth J. [52] Williams during said period either by stipulation or by order of court;

That your affiant was present at the office of Charles B. Taylor on the morning of December 10, 1944, when the deposition of the defendant Elizabeth J. Williams was taken by the said George Penney; that thereafter your affiant had no difficulty in checking the testimony of the said Elizabeth J. Williams as given in said deposition, but thereafter, and prior to the trial herein, your affiant, without difficulty, spoke to or interviewed the witnesses Emanuel M. Lippett, Irving H. Laykin, and David Riskin, whose affidavits are attached to the defendant Sydney M. Williams' Notice of Motion for New Trial

herein; that had the said George Penney so desired, he likewise could have spoke to or interviewed said persons, and thereby would have had the "opportunity of checking the story of Elizabeth J. Williams" claimed denied to him in his said affidavit;

That in regard to the matter contained in the affidavit of the said George Penney, commencing on line 30, page 3, and continuing to line 22, page 4, your affiant had no difficulty in ascertaining, prior to the date of the trial and subsequent to the taking of the said deposition of the said Elizabeth J. Williams, that the said assistant of S. W. (Pinky) Thompson, referred to in said affidavit, is now in the armed forces; that such fact is also disclosed in the Directory of Attorneys of Los Angeles County, published by Parker & Company; that your affiant also spoke on the telephone to a man purporting to be Louis Greenbaum, subsequent to the taking of said deposition and prior to the trial herein, and was informed by the said Louis Greenbaum that he knew and could remember nothing concerning whether or not there was an actual robbery at Calexico on December 31, 1939, and that contrary to affiant's information, said Louis Greenbaum had not represented Max Rosenthal in a controversy between said Max Rosenthal and the said Sydney M. Williams, nor could he remember any transactions [53] or conversations with the said Sydney M. Williams concerning said robbery nor any claim which the said Max Rosenthal had against the said Sydney M. Williams prior to the death of the said Max Rosenthal; that said Louis Greenbaum informed affiant that he vaguely remembered that Elizabeth J. Williams did tell him some story about there actually being no hold-up, but that such conversation occurred a long time ago and his memory was in such condition that he could be of no help as a witness

herein; that affiant is informed and believes, and therefore states the facts to be, that Herbert Ganahl, referred to in said affidavit, was associated as co-counsel for the defendant Elizabeth J. Williams, in the divorce action by Sydney M. Williams against her, a month or more after the date of the trial of said divorce action.

Affiant has no information or belief which would enable him to ascertain, or even surmise, how, or in what manner, the testimony of the said Louis Greenbaum or Herbert Ganahl might or could materially assist the court in a proper determination of the above-entitled matter, or whether their testimony would be corroborative of, accumulative to, or rebuttal or impeachment of the said Elizabeth J. Williams or said Sydney M. Williams, but your affiant states that subsequent to the taking of the deposition of Elizabeth J. Williams, and prior to the trial of the above-entitled matter, both the said Louis Greenbaum and Herbert Ganahl were available to the said George Penney for an interview and could have been subpoenaed as witnesses in the above-entitled matter; that no evidence they could now give could properly be newly discovered evidence which the defendant Sydney M. Williams could not, with reasonable diligence, have discovered prior to the trial; that there was not, on behalf of the defendant Sydney M. Williams, "Genuine or excusable surprise or mistake in the course of the trial, and with respect to the evidence adduced therein,—which mistake and surprise were contributed to by the conduct of the plaintiff's attorneys"; that further, the said Charles B. [54] Taylor, referred to in said affidavit of the said George Penney, is not an attorney for the plaintiff, but is and was the attorney for Elizabeth J. Williams, a co-defendant herein.

(b) Regarding Affidavit of Emanuel M. Lippett:

That said Emanuel M. Lippett, whose affidavit accompanies the Notice of Motion for New Trial herein, appeared in the above-entitled court during the trial thereof on the 13th and 14th days of December, 1944; that the said Emanuel M. Lippett is well known to the defendant Sydney M. Williams, and his presence in court during said times was observed by the defendant Sydney M. Williams; that the said Emanuel M. Lippett testified on behalf of the plaintiff herein and was cross-examined by the attorney for Sydney M. Williams during the trial hereof; that although both the ring and the watch referred to in the affidavit of Emanuel M. Lippett were in evidence and in court during both of said times, and the said person had an opportunity to examine said exhibits and had previously done so prior to the trial, the said Emanuel M. Lippett was asked no questions concerning his appraisal of said ring and watch by the attorney for the said Sydney M. Williams while the said Emanuel M. Lippett was on the witness stand, nor was any inquiry of any kind made concerning said watch or ring by the said defendant or his attorney.

That your affiant, subsequent to the taking of the deposition of Elizabeth J. Williams, but prior to the trial herein, interviewed the said Emanuel M. Lippett and exhibited the watch and ring to the said Emanuel M. Lippett, and was then informed by the said Emanuel M. Lippett that the watch and its bracelet attachment appeared to be the watch and bracelet attachment which he had previously appraised; that in his opinion said watch and bracelet attachment were worth the sum of \$350.00 as of the date of the appraisement, and that the friendship ring was worth the sum of \$300.00 at that time, and more at the present time; that on December 12, 1944,

the said Emanuel M. Lippett telephoned [55] your affiant inquiring when he would be called as a witness, and at that time informed your affiant that when called as a witness he would testify that the ring and the watch were, in his opinion and to the best of his recollection, the identical ring and watch which he had appraised for the said Sydney M. Williams for the purpose of insuring the same; that the said Emanuel M. Lippett was then requested to appear in court the next day as a witness; that on the next day said Emanuel M. Lippett informed your affiant that unless affiant had the original appraisement, made and signed by him, which affiant did not have, that he, the said Emanuel M. Lippett, could not testify regarding the said ring and watch; that affiant was therefore unable to call the said Emanuel M. Lippett as a witness in behalf of the plaintiff, but the said Emanuel M. Lippett was thereafter called as a rebuttal witness with regard to the method of appraisement, his said testimony appearing at pages 263 to 275 of the Reporter's Transcript of the proceedings herein.

(c) Regarding Affidavit of David Riskin:

That on or about the 12th day of December, 1944, your affiant personally interviewed said David Riskin, whose affidavit is attached to the Notice of Motion for New Trial herein; that at said time said David Riskin was asked whether he recalled a transaction in the month of February, 1939, in which he received a check in the sum of \$500.00 from Sydney M. Williams, and what said check was in payment of; that said David Riskin informed affiant that he had no knowledge or memory whatsoever of said transaction, and that he would be unable to testify concerning the same or what said check was in payment of, if anything; that he did not remember

selling a friendship ring or a 3-Carat engagement ring to the said Sydney M. Williams at that time, and that, because of his complete loss of memory and recollection, he would be unable to testify concerning any of the said facts; that the said David Riskin also informed your affiant that he had [56] no recollection of any transaction in 1939, during which Elizabeth J. Williams and Sydney M. Williams appeared before him together and purchased from him some jewelry, and that he had no records, his records having been destroyed in a fire.

That the said David Riskin was present in court on December 13, and December 14, 1944, as a spectator, and during said time was observed by your affiant on several occasions consulting and advising with the defendant Sydney M. Williams; that during said time, and prior to the taking of all of the evidence herein, affiant is informed and believes, and therefore states, that the said David Riskin examined the said watch and ring, then filed as exhibits with the court, and thereafter conversed, advised, and consulted with the said Sydney M. Williams.

(d) Regarding Affidavit of Irving H. Laykin:

That subsequent to the taking of the deposition of Elizabeth J. Williams, but prior to the trial in the above-entitled action, your affiant went to the Master Aircraft Parts Co., 249 North Reno, Los Angeles, California, for the purpose of interviewing Irving H. Laykin in regard to the above-entitled matter; that while there your affiant was informed by an office employee, or manager, that Mr. Laykin was and is a very busy man engaged in defense industry, and that it might be difficult for him to personally interview Mr. Laykin, but if affiant wished to speak to him by telephone, said employee, or manager,

would call the said Irving H. Laykin by telephone at Young's Health Club, 5th Street and Hill Street, Los Angeles, California, and get him on the telephone for affiant, which said person thereupon purported to do; that affiant was then connected with a person purporting to be Irving H. Laykin and asked the said Irving H. Laykin whether he knew Sydney M. Williams, and whether or not he recalled appraising various articles of jewelry for the said Sydney M. Williams; that the said Irving H. Laykin informed your affiant that he knew Sydney M. Williams and recalled having looked at [57] some pieces of jewelry for him, but that he could not remember when or what pieces of jewelry they were, nor whether he had appraised a 3-Carat diamond ring or a platinum diamond wrist watch with bracelet attachment, nor could he recall the value of any of said articles; that he had not seen said Sydney M. Williams for some time; that, as he recalled it, said Sydney M. Williams was always trying to "chisel a bargain", and that it is quite possible that said Sydney M. Williams purchased a diamond wrist watch from him for \$55.00 in 1937, which price would probably have been greatly under its retail value; that affiant asked the said Irving H. Laykin whether he would so testify in court as a witness and was informed by the said Irving H. Laykin that there would be no such need for his testimony, because Sydney M. Williams admitted, and would admit in court, that he had purchased said watch from him at that time for the said sum; that the said Irving H. Laykin further informed your affiant that he could not recall the make or description of the watch, but, in fact, his recollection of the whole transaction was very poor, and further, his records had been lost in a fire and could not be produced.

That affiant makes this affidavit for the purpose of showing that neither the defendant Sydney M. Williams nor his attorney could have been taken by surprise in the above-entitled matter regarding the testimony of the persons herein above referred to, nor would such evidence, if introduced, be newly discovered evidence which the defendant, in the exercise of reasonable diligence, could not have discovered prior to the trial of this action; that said testimony, if introduced at a new trial hereof, would not only be subject to impeachment, but would be merely corroborative, or accumulative, or rebuttal, or impeaching testimony.

HUNTINGTON P. BLEDSOE [58]

Subscribed and Sworn to Before Me This 22nd day of January, 1945.

Seal

ROBERT W. COOPER
Notary Public in and for the County of Los Angeles,
State of California

[Endorsed]: Filed Jan. 22, 1945. [59]

[Minutes Tuesday, February 20, 1945.]

Present: The Honorable Peirson M. Hall, District Judge.

This cause having heretofore come before the Court for hearing on motion of defendant Sydney Williams for a new trial, to amend Findings of Fact and Conclusions of Law, to direct the entry of a new judgment and motion to correct Findings and to make same more definite and

certain, and evidence in the form of oral argument having been heard in support of and in opposition to said motions, and same having been duly heard and considered, the Court, being now fully advised in the premises, orders said motions denied. [60]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Continental Insurance Company of New York, a corporation; and to Hindman & Davis and Huntington P. Bledsoe, its attorneys:

Notice Is Hereby Given that Sydney M. Williams, a defendant in the above-entitled action, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the within action on or about the 2nd day of January 1945, and from the orders of the court in the within action denying said defendant's motion for a new trial, motion to amend findings of fact and conclusions of law and direct the entry of a new judgment, and motion to correct findings and make the same more definite and certain.

Dated this 2nd day of March 1945.

GEORGE PENNEY
Attorney for Defendant Sydney M. Williams

[Endorsed]: Filed & mld. copy to Hindman & Davis & H. P. Bledsoe, attys. for plf. Mar. 7, 1945. [61]

[Title of District Court and Cause.]

STIPULATION RE SUPERSEDEAS AND
COST BOND

It Is Hereby Stipulated by and between plaintiff and defendant Sydney M. Williams in the above-entitled action that the court make an order fixing the supersedeas and cost bond on appeal to be filed by the defendant Sydney M. Williams in relation to an appeal to be taken in the above-entitled action by said defendant in the sum of Six Thousand Two Hundred and Fifty Dollars (\$6250).

Dated February 26, 1945.

HINDMAN & DAVIS AND
HUNTINGTON P. BLEDSOE

By Huntington P. Bledsoe
Attorneys for Plaintiff

GEORGE PENNEY

Attorney for Defendant Sydney M. Williams [62]

In accordance with the foregoing stipulation It Is Hereby Ordered that the amount of the supersedeas and cost bond on appeal to be filed by the defendant Sydney M. Williams in relation to an appeal to be taken by it in the above-entitled action be and hereby is fixed at the sum of Six Thousand Two Hundred and Fifty Dollars (\$6250).

Dated this 27 day of February 1945.

PEIRSON M. HALL
Judge

[Endorsed]: Filed Feb. 28, 1945. [63]

[Title of District Court and Cause.]

•SUPERSEDEAS AND COST BOND ON APPEAL

Know All Men by These Presents, That We, Sydney M. Williams et al., as Principal, and the Glens Falls Indemnity Company, a Corporation duly organized and existing under the laws of the State of New York and duly qualified for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America, as Surety, are held and firmly bound unto The Continental Insurance Company of New York, a corporation, Plaintiff above named, in the sum of Six Thousand Two Hundred Fifty (\$6250.00) Dollars, lawful money of the United States, to be paid to The Continental Insurance Company of New York, a Corporation, or its successors, to which payment well and truly to be made, we bind ourselves, and our successors, jointly and severally, firmly by these presents.

Whereas, said Sydney M. Williams, a Defendant in the above entitled cause in said District Court of the United States, Southern District of California, Central Division, is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and entered against the said Sydney M. Williams and in favor of The Continental Insurance Company of New York, a Corporation, on or about the 2nd day of January, 1945 in the sum of \$4250.00 together with interest thereon at the rate of 7 percent per annum from March 10, 1940, together with costs in the sum of \$130.44; and is also about to appeal from the court's order denying said defendant's motion for a new trial, motion to amend findings of fact and conclusions of law and direct the entry

of a new judgment, and motion to correct findings and to make the same more definite and certain; and

Whereas, the said Sydney M. Williams is desirous of staying the execution of said judgment and of said orders.

Now, Therefore, the condition of the above obligation is such that if the said defendant Sydney M. Williams, shall prosecute said appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, and if said defendant Sydney M. Williams fails to make good his plea, then the above obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof, the Principal has hereunto set his hand and seal and the Surety has caused this instrument to be executed by its duly authorized Attorney this 1st day of March, 1945.

SYDNEY M. WILLIAMS

Principal

GLENS FALLS INDEMNITY COMPANY

By: HARRY LEONARD

Attorney

State of California,

County of Los Angeles—ss.

On this 1st day of March in the year One Thousand Nine Hundred and Forty-five before me, Marwin F. Jonas, a Notary Public in and for the said County of Los Angeles, residing therein, duly commissioned and

sworn, personally appeared M. Klotz known to me to be the Attorney of the Glens Falls Indemnity Company, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the County of Los Angeles, the day and year in this certificate first above written.

(Seal)

MARWIN F. JONAS

Notary Public in and for the County of
Los Angeles, State of California.

My commission expires Nov. 2, 1947.

[Endorsed]: Filed Mar. 7, 1945. [64]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY IN THE APPEAL OF THIS CASE

I

That the findings of fact do not support the conclusions of law or judgment in said case.

II

That the judgment is contrary to law.

III

That the evidence is insufficient to sustain the findings of fact of the trial court.

IV

That the trial court failed to make findings on material issues raised by the pleadings, to wit:

- A. What the actual value was of those certain articles set forth in the defendant's proof of loss and specifically mentioned in Paragraph IX of plaintiff's complaint.
- B. Whether or not said defendant falsely or fraudulently [65] represented the value of said articles.
- C. That certain of the articles of jewelry involved in the alleged fraud of which plaintiff complains were, at the time of the trial and judgment, in the possession of the plaintiff.
- D. That certain articles introduced in evidence as having been involved in said holdup were not the articles listed in or covered by plaintiff's policy of insurance nor the articles listed in defendant's proof of loss.

V

That the judgment is excessive in that it appears from the evidence that the plaintiff had possession of certain articles of jewelry alleged to have been set forth in defendant's proof of loss; whereas said judgment now includes the value of said articles in possession of the plaintiff without giving credit therefor to this defendant.

VI

That the trial court erred in denying defendant's motion for a new trial.

VII

That the court erred in denying defendant's motion to amend findings of fact and conclusions of law and direct the entry of a new judgment.

VIII.

That the court erred in denying defendant's motion to correct the findings and to make the same more definite and certain.

Dated this 2nd day of March 1945.

GEORGE PENNEY

Attorney for Defendant Sydney M. Williams

[Endorsed]: Filed Mar. 7, 1945. [66]

[Title of District Court and Cause.]

ORDER AS TO ORIGINAL EXHIBITS

Upon Reading and Filing the Supplemental Designation of Record on Appeal, and good cause appearing, it is,

Ordered that all original exhibits introduced during the trial of the above-entitled cause, including therein the physical exhibits introduced during the trial, shall be sent to the Circuit Court of Appeals of the United States for the Ninth Circuit at San Francisco, California, by registered mail, to be held in the office of the clerk of said Circuit Court of *Appeal* for the examination and inspection of said Circuit Court of Appeals, and to be returned by registered mail to this Court together with the remittituir, which will issue from said Court upon said Court's decision on appeal.

It Is Further Ordered that the costs of transportation and [74] registering be borne by the defendant and appellant, Sydney M. Williams.

Dated: 5/1/45.

PEIRSON M. HALL

Judge

[Endorsed]: Filed May 1, 1945. [75]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 75 inclusive contain full, true and correct copies of Complaint in Fraud for Money; Answer of Sydney M. Williams; Answer of Elizabeth J. Williams; Minute Order Entered December 14, 1944; Objections to Findings of Fact and Conclusions of Law and Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Entry of Judgment; Notice of Hearing on Motion for New Trial etc.; Motion for New Trial, Motion to Amend Findings of Fact and Conclusions of Law and Direct the Entry of a New Judgment, and Motion to Correct Findings and to Make the Same More Definite and Certain; Separate Affidavits of George Penney; Rosalind Goodrich Bates, David Riskin, Emanuel M. Lippett, Irving H. Laykin and Huntington P. Bledsoe; Minute Order Entered February 20, 1945; Notice of Appeal; Stipulation and Order re Supersedeas and Cost Bond; Supersedeas and Cost Bond on Appeal; Statement of Points Upon Which Appellant Intends to Rely in the Appeal of this Case; Designation of Record on Appeal; Affidavit of Service by Mail; Stipulation and Order re Exhibits and Extending Time to Docket Appeal; Supplemental Designation of Record on Appeal; and Order as to Original Exhibits which, together with Original Plaintiff's Exhibits 1 to 11, inclusive and 13 and Original Defendants' Exhibits A and AA and Copy of Reporter's Transcript transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$17.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 2 day of May, 1945.

EDMUND L. SMITH,

(Seal)

Clerk

By THEODORE HOCKE

Chief Deputy Clerk

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that during the trial of the above-entitled cause there was received in evidence as Plaintiff's Exhibit 12 the files of the Superior Court of the State of California in and for the County of Los Angeles No. 198085 entitled Williams v. Williams and same is hereby certified as a part of the record on appeal in the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 18th day of June, 1945.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke

Chief Deputy Clerk.

[Endorsed]: Filed Jun. 19, 1945. Paul P. O'Brien,
Clerk.

[Title of District Court and Cause.]

Hon. Peirson M. Hall, Judge Presiding.

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL.

Los Angeles, California, December 12, 13, 14, 1944.

Appearances:

Hindman & Davis, by
E. Eugene Davis, Esq., and
Huntington P. Bledsoe, Esq.,
For Plaintiff.

George Penney, Esq.,
For Defendant Sydney M. Williams.

Charles B. Taylor, Esq.,
For Defendant Elizabeth J. Williams.

Mr. Davis: If the court please, we allege and expect to prove that the plaintiff issued the insurance policy, and we expect to prove the making of the claim and the payment of the money, and that is admitted in the pleadings. And we expect to prove that subsequently we discovered that the claim was false, that there had been no robbery, and that the statements in such proof of loss were falsely made. The defendants each admit the execution of the policy and the making of the claim and the receipt and payment of the money.

The defendant Elizabeth Williams admits all of the allegations of the complaint, except that she denies that she got the money.

The Court: She denies that she got the money under the insurance policy?

Mr. Davis: Yes, your Honor.

The Court: And the other defendant admits that he got the money?

Mr. Davis: Yes.

The Court: The insurance policy was issued, and was dated June 2, 1939, and the alleged robbery occurred December 31, 1939; is that correct? [3*]

Mr. Davis: That is correct.

The Court: There is no issue as to the issuance of the policy?

Mr. Taylor: None whatever, your Honor.

The Court: And there is no controversy as to its terms?

Mr. Penney: None whatsoever.

The Court: As to the property it covered?

Mr. Penney: No, your Honor.

The Court: As to the making of the claim for the robbery?

Mr. Penney: No, your Honor.

The Court: And as to the payment by the insurance company of the money on the robbery?

Mr. Penney: That is right.

The Court: And its acceptance by the defendant Sydney Williams?

Mr. Penney: That is right.

The Court: The issue, then, boils down to this, as to whether or not the alleged robbery on December 31st was a robbery?

Mr. Davis: Yes, your Honor. They all come under the same proof. I would like to call the defendant Elizabeth Williams as a witness under Section 43 (b) of the Rules.

The Court: All right. Elizabeth Williams. [4]

ELIZABETH J. WILLIAMS,

called as a witness on behalf of plaintiff, under the provisions of Rule 43 (b), being first duly sworn, testified as follows:

The Clerk: State your name.

A. Elizabeth J. Williams.

The Clerk: And your address.

A. Woodlake, California.

The Court: You are calling this witness under the provisions of the Rules of Civil Procedure, permitting you to call an adverse party and cross-examine her, without being bound by her testimony?

Mr. Davis: That is correct, your Honor, under 43 (b) of the Federal Rules.

The Court: And counsel has explained to you the effect of such a rule of law, has he? A. Yes.

Direct Examination

Q. By Mr. Davis: You are Elizabeth Williams?

A. Yes.

Q. And you reside at Woodlake, California?

A. Yes.

Q. How long have you been living there?

A. About four months.

Q. And you went there from Los Angeles?

A. Yes, sir. [5]

Q. Mrs. Williams, you and the other defendant, Sydney Williams, were formerly husband and wife?

A. Yes, sir.

The Court: Do you have some notes there?

A. No, I haven't. I am just marking. Do you mind?

The Court: Well, just leave the paper. If you want to play with a pencil, here are a lot of them, if you want to play with them.

(Testimony of Elizabeth J. Williams)

The Witness: All right.

Q. By Mr. Davis: You and the defendant Sydney Williams were formerly husband and wife?

A. Yes.

The Court: You are not now? A. No.

Q. By Mr. Davis: When were you married?

A. June 3, 1939.

Q. When were you divorced?

A. In October or November, 1941, I believe.

Q. That is when the decree was entered?

A. Yes.

The Court: Final? A. I don't know about final.

The Court: Does counsel know?

Mr. Taylor: I believe it was an interlocutory decree.

Mr. Bledsoe: 1941, in October.

The Court: Final? [6]

Mr. Bledsoe: In October.

Mr. Davis: You will stipulate that final decree has been entered?

Mr. Penney: It is stipulated that final decree has been entered.

Q. By Mr. Davis: Mrs. Williams, during the marriage of yourself and Sydney Williams, did you and Mr. Williams have certain property, consisting of jewelery?

A. Yes, sir.

Q. So that we will be referring to the same items all the time, I am handing you this paper.

The Court: That is a memorandum of the items contained in the insurance policy?

Mr. Davis: Yes, as contained in paragraph 5 of the policy. That is for reference only.

(Testimony of Elizabeth J. Williams)

Q. By Mr. Davis: During your marriage did you have any of the articles described in that list? Say yes or no, and then I will ask you specifically.

A. Yes.

Q. Calling your attention—

The Court: By the way, so that the record may be kept straight, we had better have this paper she has marked for identification, and it will be marked Plaintiff's Exhibit 1 for identification.

Q. By Mr. Davis: I direct your attention to one platinum diamond watch with diamond bracelet attachment [7] containing 84 diamonds and two baguettes. Did you have an item answering that description?

A. Yes, sir.

Q. When did you acquire it? When did you get it?

A. We got the watch the latter part of July, 1937.

Q. Do you know where you got it?

A. Yes. I bought it from Laykin's.

The Court: Of course, we don't know who Laykin was or what.

A. He had a jewelry store on Fifth Street, I believe.

Q. By Mr. Davis: When did you get the bracelet attachment?

A. The day—just before we were married, from Lippett.

The Court: Who is Lippett?

A. I don't know how to spell it.

The Court: Where is he?

A. Well, I believe he had an office on Sixth Street, but I met him at Hutton's.

Q. By Mr. Davis: You might explain how you met Mr. Lippett. How did you happen to buy that watch at the—

(Testimony of Elizabeth J. Williams)

A. We met Mr. Lippett at the stock market.

Q. Did you transact the business there?

A. Some of it. No, we went up to his office.

Q. Now, one platinum diamond wedding ring with 11 diamonds—where and when did you get that? [8]

The Court: That is not involved in this suit, is it?

Mr. Davis: Well, it is not involved, but it is part of the—I think she can explain in a few words.

The Court: All right.

A. Mr. Lippett made the wedding ring also.

Q. By Mr. Davis: Did you or did you not get the wedding ring at the same time you got the attachment for the watch? A. Yes, we did.

Q. One diamond friendship ring, large center with 14 smaller round stones set in platinum. Where did you get that?

A. Mr. Williams gave it to me in July or August of 1937.

Q. Do you know where he got it?

A. No, I don't.

Q. One diamond and emerald bracelet set in platinum with 1 Marquise center and 74 full-cut diamonds weighing approximately 5 carats. When did you acquire that?

A. I believe in June, just before we were married.

Q. From whom did you get that?

A. Mr. Lippett.

The Court: You bought it?

A. Yes, sir.

The Court: Or Mr. Williams bought it?

A. Mr. Williams bought it.

The Court: Did he buy it and give it to you? [9]

A. Yes, sir.

(Testimony of Elizabeth J. Williams)

Q. By Mr. Davis: The next item is, 1 platinum diamond engagement ring, center stone weighing approximately 3 carats, also containing 8 baguettes and 22 round diamonds. Where was that acquired?

A. From Dave Riskin.

Q. Where was he located at that time?

A. He was in the Loew's State Building at that time.

Q. When was that acquired, approximately?

A. The first part of February, 1939.

Q. Were you present when he bought it?

A. Yes, sir.

Q. Do you know how much he paid for it?

A. \$500.

The Court: That it item No. 4?

Mr. Davis: Item No. 5.

The Court: Item No. 5?

Mr. Davis: Yes.

The Court: Who paid for it? Did you buy it?

A. Mr. Williams bought it.

The Court: And gave it to you?

A. Yes, as my engagement ring.

Q. By Mr. Davis: Item No. 6, 1 gent's diamond ring measuring scant 2 carat center. Do you know when that was acquired? A. Yes, sir. [10]

Q. And where? When was it acquired?

A. I think just before we were married.

Q. Have you any memorandum or data from which you could get the date? A. Yes, I have.

Q. What have you? A. I have a check.

Q. Will you produce it? A. Yes.

Mr. Davis: You have handed me a document. I will have this marked first.

(Testimony of Elizabeth J. Williams)

The Court: Do you want to use it to refresh her recollection?

Mr. Davis: I want to introduce it in evidence—both.

The Court: Let us mark it as Plaintiff's Exhibit No. 2 for identification, then. That is a check?

Mr. Davis: That is a check.

The Court: Dated when?

Mr. Davis: Dated 5/5/1939. That would be May 5, 1939, would it not? A. Yes.

The Court: In the sum of what?

Mr. Davis: In the sum of \$250, to John Marcin.

Q. Does that refresh your memory as to the time any of these jewels were bought?

A. Yes. It was just a month before we were married.

[11]

Q. Were you present when that jewelry was bought?

The Court: Whose check is that?

Q. By Mr. Davis: Whose check is this?

A. Mr. Williams'.

The Court: Is his signature on it?

A. Yes, sir.

Q. By Mr. Davis: And does it have—

Mr. Penney: I will stipulate that that is Mr. Williams' check and was drawn on Mr. Williams' account.

Q. By Mr. Davis: I will ask you if you were present when the transaction was made. A. Yes, sir.

Q. And did you know the man from whom the diamond was bought? A. Yes, sir.

Q. Who was he?

A. Well, he was a friend that worked on the boat and helped us when we were around with the boat.

Q. John Marcin?

(Testimony of Elizabeth J. Williams)

A. Yes. And he also worked at the garage where we had the car, part of the time.

Q. Do you know whether the notation above the endorsement was on there at the time the check was given, the notation being, "1 man's diamond ring"?

A. Yes.

Q. Do you know whose handwriting that is? [12]

A. Mr. Williams'.

Mr. Davis: We will offer this in evidence as Plaintiff's Exhibit No. 2.

The Court: Is there any question but what this is the total sum paid for the ring?

Mr. Penney: Your Honor, we shall establish that this particular check was not involved in this litigation, that this check was given for a ring, but we shall establish what ring it was.

The Court: It is admitted in evidence.

Q. By Mr. Davis: Mrs. Williams, referring back to item No. 1, purchased from Laykin, do you know what was paid for this platinum diamond watch?

A. \$50 or \$55.

Q. Do you have a memorandum or a check?

A. Yes, I have a check for that.

Q. Showing the payment for that item?

A. Yes, I have.

Mr. Davis: I want to show it to counsel first. I would like to have this check marked for identification.

The Clerk: Plaintiff's Exhibit No. 3 for identification.

Mr. Davis: For your convenience, your Honor, may I just read the check to you?

The Court: Yes.

(Testimony of Elizabeth J. Williams)

Mr. Penney: We will stipulate again that this check is Mr. Williams' check and was drawn against his account. [13]

The Court: It is for identification, and he thought the record ought to have a description of it, what it purports to be.

Mr. Davis: This purports to be a check drawn on the Sixth and Spring office of the Security-First National Bank, dated August 28, 1937, "Pay to the order of Laykin Diamond Co. \$55.00", and signed "Sidney M. Williams", and endorsed, "Pay to the order of Citizens National Trust & Savings Bank of Los Angeles, Laykin Diamond Co.", the endorsement being by stamp.

The Court: The stipulation is that that was Mr. Williams' check, and was drawn on his account, and that it was paid?

Mr. Penney: Yes, your Honor.

The Court: And that it was paid for the watch that is—

Mr. Penney: No, your Honor. There will definitely be a conflict in the evidence on that.

Q. By Mr. Davis: Mrs Williams, will you look at this check, which is dated August 28, 1937, and state whether or not that check was paid for the watch which is described in item No. 1 of that memorandum, Plaintiff's Exhibit 1, which you have there?

A. Yes, that was the check that was paid for it.

Mr. Davis: We offer this check in evidence.

Q. Referring again to item No. 1 and the bracelet described therein, which you say you purchased from Lay-

(Testimony of Elizabeth J. Williams)

kin, [14] have you any check or memorandum showing payment for that item?

A. Yes, for the bracelet, my watch, and my wedding ring.

Mr. Davis: Mr. Bledsoe calls my attention to the fact that maybe I had better refer to that as an attachment, instead of a bracelet. That is a watch attachment. Do you have that check? A. Yes.

Q. May I see that?

Mr. Penney: Which item is this?

Mr. Taylor: Is No. 3 admitted in evidence, your Honor?

The Court: Yes. That is the check for \$55. I don't think I formerly indicated that, but I will do so now.

Mr. Penney: We will stipulate again that this is his check and was drawn against his account.

Mr. Davis: I will ask to have this instrument marked for identification.

The Court: Mark it No. 4 for identification.

Mr. Davis: Q. Describing the document, No. 4 for identification, it is supposed to be a check drawn on the Sixth and Spring Street Office of the Security-First National Bank, dated 5/12/1939. That is May 12, 1939?

A. Yes.

Mr. Davis: It is drawn to the order of E. M. Lepetz, in the sum of \$90, and signed "Sydney M. Williams," and [15] endorsed on the back, "E. M. Lepetz."

Q. Will you state for what that check was given?

A. For the attachment to the watch and the wedding ring.

Q. Were you present when the transaction was made?

Mr. Penney: I didn't get that last answer.

(Testimony of Elizabeth J. Williams)

Mr. Davis: For the attachment for the watch and the wedding ring.

The Court: That is what you described as a diamond bracelet attachment containing 84 diamonds and 2 baguettes, and 1 platinum diamond wedding ring with 11 diamonds?

Mr. Davis: Yes—item No. 1.

The Court: Is that it?

A. Yes.

The Court: It was given for the attachment of which I just read the description and the diamond wedding ring?

A. Yes.

Q. By Mr. Davis: Where did this transaction take place?

A. Up in Mr. Lepetz' office.

Mr. Davis: We will offer in evidence this check as Plaintiff's Exhibit No. 4.

The Court: Admitted. Were you present at that time?

A. Yes, sir.

The Court: What happened? Who else was there?

A. Mr. Williams and myself, and I think we were the only two there. [16]

The Court: And Mr. Lepetz? A. Yes.

The Court: What happened? What did you say?

A. Well, he just—

The Court: Didn't somebody say, "I want a watch," or "I want a diamond ring"?

A. Yes. We had gone up before that.

The Court: Previously?

A. And taken the measurements.

The Court: Previously you had taken the measurements for the bracelet attachment?

A. Yes; and he made it up for us.

(Testimony of Elizabeth J. Williams)

The Court: And for the diamond wedding ring?

A. Yes; he made that up for us.

The Court: How long previously?

A. I think about a week.

The Court: Did he tell you how much it was going to cost? A. I don't think so.

The Court: When did you find out how much they were going to cost?

A. At the time we gave him the check.

The Court: And not until then? A. No.

The Court: How did Mr. Williams find out how much they were going to cost? [17]

A. Well, he would stop and talk every day with Mr. Lepetz, and I suppose they discussed it.

The Court: You mean that when you were present neither one said anything to the other about how much it was going to be?

A. Yes; Mr. Williams asked Mr. Lepetz.

The Court: What did Mr. Williams say?

A. Asked him how much it was going to cost him.

The Court: Is that what he said—"How much are you going to charge me"? A. Yes.

The Court: That was after he delivered them?

A. When we went up for them.

The Court: And you put the watch and the ring on then? A. Yes.

The Court: The wedding ring?

A. No, not then.

The Court: When he asked how much it was going to cost, what did Mr. Lepetz say?

A. \$90 for the two.

(Testimony of Elizabeth J. Williams)

The Court: Was that all that you bought from Mr. Lepetz? A. No. At that time it was.

The Court: \$90 for the two? A. Yes.

The Court: And Mr. Williams took his check book out and [18] gave him a check? A. Yes.

The Court: Did he get a receipt?

A. I don't remember.

The Court: Did he get a statement? A. No.

The Court: A bill? A. No.

The Court: Or a bill of sale?

A. No, because he was a wholesale diamond man; he wasn't a retailer.

The Court: Why do you say "because"?

A. Well, he wasn't supposed to sell the rings to a private party.

The Court: All right. Excuse me, counsel.

Mr. Davis: That is all right.

Q. By Mr. Davis: What kind of a place would you say Mr. Lepetz had? Was it a store?

A. It was a work shop. It wasn't a store. He had a work room and a small office.

Q. Where did you say that was?

A. I believe it was on Sixth Street.

Q. Upstairs?

A. Yes. I don't know what building.

Q. Did he have any employees around?

A. Yes; there was a man there. [19]

Q. How did you get acquainted with him?

A. We met him at Hutton's.

Q. Did you know him before that? Did Mr. Williams know him? A. No, I didn't.

Q. What was he doing at that time?

A. Playing the market.

(Testimony of Elizabeth J. Williams)

Q. What were you doing?

A. The same thing.

Q. And Mr. Williams? A. Yes.

Q. Where was Hutton's located?

A. On Olive Street.

Q. Olive and what?

A. Between Fifth and Sixth.

Q. Olive Street or Spring Street?

A. Olive.

Q. I believe you stated that you didn't know where the diamond friendship ring came from.

A. No. He gave that to me.

Q. You don't know when that was bought?

A. No.

Q. You stated that you bought this diamond bracelet from Lippett? A. Yes.

Q. Have you any memorandum or check to show what was [20] paid for that?

A. Yes; there was a check used in the divorce case, Mr. Davis.

Q. Used in the divorce case? A. Yes.

Q. Do you know what was paid for that bracelet?

A. \$350.

Q. Are you sure of that?

A. I believe it was \$350. It could be different.

Q. Were you present when that was paid?

A. No.

The Court: That was bought from Lippett?

A. Yes.

Mr. Davis: That is item No. 4, your Honor.

Q. By Mr. Davis: Did you hear any discussion between Mr. Williams and Mr. Lippett about the purchase of it? A. No, I didn't.

(Testimony of Elizabeth J. Williams)

Q. How did you know it cost \$350?

A. Mr. Williams told me.

Q. And you saw the check subsequently to the time it was given? A. Yes, sir.

Q. And you think it was introduced in the divorce case? A. Yes, it was.

Q. The next item, item No. 5, 1 diamond platinum [21] engagement ring—you said that was bought from whom? A. David Riskin.

Q. And his office is in Loew's State Building?

A. Yes. I don't believe he had an office. He was working out of somebody else's office.

Q. He didn't have a store? A. No.

Q. Where was the transaction made?

A. In this other man's office.

Q. And you don't recall the name of the man?

A. No, I don't.

Q. Do you know whether it was upstairs?

A. Yes, it was upstairs.

Q. And what was the appearance of it? Was there a stock of jewelry around there?

A. Yes, there was.

Q. Any clerks around? A. Yes.

Q. How was this transaction made with Riskin? I mean, did you just go in and say you were looking for some jewelry?

A. Mr. Williams had discussed it with Mr. Riskin.

The Court: That was the first time you met Mr. Riskin, was it?

A. No: I had met him on the street and had an introduction.

(Testimony of Elizabeth J. Williams)

Q. By Mr. Davis: That was the second time? [22]

A. Yes, sir.

Q. Was the transaction completed there at that time?

A. Yes, it was.

Q. And Mr. Williams gave him a check at that time?

A. Yes, sir.

Q. And that check was used also in the divorce?

A. Yes.

Q. It is in the files, you think?

A. Yes, I believe so.

Q. If I told you that there was a check in the divorce files, dated February 6, 1939, would you say that was the check? A. Yes.

Q. Covering these items? A. Yes.

Q. That was the approximate date when this transaction was had? A. Yes, it was.

Q. Now, Mrs. Williams, on December 31, 1939, did you and Mr. Williams have any other jewelry other than this described in the list which I have handed you, Exhibit No. 1 for identification? Do you understand the question? A. Yes.

Q. Did you have any other jewelry?

A. Yes. Mr. Williams had another small stone, a ring with a small stone in it, that he wore before he bought this [23] larger diamond.

Q. When you say "this larger diamond", you mean—

A. The two-carat diamond.

Q. No. 6? A. Yes.

Q. And what else?

A. Well, I had a cigarette case.

Q. Did Mr. Williams have an Elk pin?

Mr. Penney: Just a minute.

(Testimony of Elizabeth J. Williams)

Mr. Davis: I am cross examining her.

Mr. Penney: I object.

The Court: Overruled.

A. Yes, he had an Elk pin.

Q. By Mr. Davis: When you speak of jewelry, you mean with jewels in it? A. Yes.

Q. Your cigarette case, what was that?

A. It was a cigarette case that I had had for many years.

Q. Will you describe it?

A. It was a black case, and it had a platinum bee with diamonds in it, very small chips, and on the corners there were four stones.

Q. On what corners?

A. Around the bee.

Q. How large were the stones? [24]

A. I don't know. I imagine about 40 points.

Q. Have you any idea what the value of that cigarette case was?

A. No, I haven't. I know approximately how much it cost at the time it was bought.

Q. How much did it cost? A. It cost \$350.

Q. Did you have that on June 2, 1939, at the time—

A. Yes.

Q. Where was it at that time?

A. It was in the house.

Q. And where did you keep it in the house?

A. In my dressing table drawer.

Q. How long before June 2, 1939, had it been bought for \$350? A. In 1928 or 1929.

(Testimony of Elizabeth J. Williams)

Q. Now, this ring you said Mr. Williams had, can you describe that, that is, the ring in addition to those that you have enumerated here?

A. Well, it had the same size stone that my friendship ring had in it.

Q. That is the friendship ring described here as item No. 3? A. That is right.

Q. What sort of a setting did it have?

The Court: What size was that? [25]

A. About 80 point, I believe.

The Court: What is an 80-point stone?

A. There are 100-points to a carat.

Q. By Mr. Davis: Will you describe the setting?

A. It was just a plain ring mounting.

Q. A man's setting? A. Yes, sir.

Q. Do you know where he got that?

A. No, I don't. He was wearing it when I met him.

Q. What became of that when he got the ring described as item No. 6 here?

A. He put it away, to keep it.

Q. Do you know where he put it or kept it?

A. No.

Q. When was the last time you saw that ring?

A. May or June, 1939.

Q. About the time you bought item No. 6?

A. Yes, after that.

Q. After that?

A. Yes, sir. May or June, 1940. Pardon me.

Q. 1940? A. Yes.

Q. Now, the other item, the Elk's pin, can you describe that?

A. No. It was just an Elk's pin.

(Testimony of Elizabeth J. Williams)

Q. Did he ever wear it? [26]

A. No, not that I recall.

Q. Where did he keep that?

A. At the time I saw it he had it in his safe deposit box, and he showed it to me.

The Court: Where was that safe deposit box?

A. In the Security Bank—the same bank that the checks were made on.

The Court: When did he show it to you?

A. 1937.

Q. By Mr. Davis: And when was the last time you saw the Elk's pin? A. It was 1940.

The Court: What is the materiality of that?

Mr. Davis: I will withdraw that question.

Q. Now, those three items were the only pieces of jewelry either one of you had, in addition to these specified in the proof of loss or in the policy?

A. Yes.

Q. Now, on December 31, 1939, where were you?

A. We went to Calexico.

Q. Had you discussed the trip to Calexico with Mr. Williams before you went? A. Yes, sir.

Q. Where did you stay in Calexico?

A. At the Di Anzo Hotel.

Q. Did you take any jewelry to Calexico on December [27] 31, 1939? A. No, sir.

Q. When did you arrive in Calexico on December 31st?

A. It would be the day before.

Q. Did you take any jewelry there on the day before?

A. No, sir.

(Testimony of Elizabeth J. Williams)

Q. Of any kind?

A. I don't recall whether I took my cigarette case or not.

Q. Did you wear any jewelry down there?

A. No diamonds.

Q. Did you wear any jewelry of any kind?

A. Yes; I wore a ring.

Q. Will you describe that ring?

A. It was a ring we had bought at a Chinese store on Hollywood Boulevard.

Q. How much did you pay for it?

A. \$1.95 or \$2.95.

Q. Can you describe what it looked like?

A. It was a large white stone.

Q. Did it look like any of the jewels described in the list you have before you?

A. Yes—similar to my engagement ring.

Q. You paid \$1.95 for it?

A. \$1.95 or \$2.95. It was a cheap ring.

Q. And that was all the jewelry you had with you?

[28]

A. No. Mr. Williams had his wrist watch.

The Court: Was that jewelry? I understood you to say that jewelry meant something with jewels in it.

Mr. Davis: Jewelry or watch. There is a wrist watch involved.

Q. That wrist watch, is this a description of it: 1 wrist watch, Gruen Curvex, yellow gold case?

A. Yes; he was wearing that watch.

Q. Was he wearing that watch? A. Yes.

Q. Was he wearing any other items of jewelry or adornment? Did he have any rings or pins?

(Testimony of Elizabeth J. Williams)

A. I don't know whether he was wearing the ring with the small stone in it or not; I can't recall.

The Court: Did he have any of these items?

A. No.

The Court: None of 1, 2, 3, 4, 5 or 6?

A. No.

The Court: Did you? A. No.

The Court: Did you take them with you in your suitcase? A. No.

The Court: Did he? A. No, sir.

Q. By Mr. Davis: Do you know where the jewels were, the jewels described in this list, on December 31, 1939? [29] A. Yes, sir.

Q. Where were they?

A. They were in an unfinished room behind our dressing room.

Q. Where? A. At 3418 La Sombra Drive.

Q. Los Angeles? A. Yes.

Q. And you discussed this matter with Mr. Williams before you left to go to Calexico? A. Yes.

The Court: Discussed what matter?

Mr. Davis: The matter of these jewels. I will withdraw that.

Q. By Mr. Davis: You discussed the trip to Calexico with Mr. Williams before you left? A. Yes.

Q. And you discussed the question of leaving the jewels in Los Angeles while you went to Calexico?

A. Yes.

Q. And discussed what would happen when you got down there? A. Yes, sir.

Q. Just what happened when you got to Calexico?

A. We registered at the hotel and had dinner across the line at Mexicali with some friends of his. [30]

(Testimony of Elizabeth J. Williams)

Q. And then what?

A. Then we spent the night at the hotel.

Q. Spent the night at the hotel at Calexico?

A. Yes.

Q. What did you do on the next day, on the 31st?

A. We drove to Yuma, Arizona.

Q. Then did anything happen to the wrist watch on the trip to Yuma? A. Yes.

Q. What happened?

A. We were driving across a bridge over the All American Canal, and Mr. Williams stopped and threw his wrist watch in the canal.

Q. Then you came back to Calexico?

A. Yes, sir.

Q. And what happened?

A. We had dinner with Mr. and Mrs. Brown again.

Q. With Mr. and Mrs. Brown?

A. Yes, sir.

Q. Where did you have dinner?

A. In Mexicali there.

Q. Then what happened after dinner?

A. I had a sick headache, and I went to bed.

Q. What happened later that day?

A. Mr. Williams called me about 11:00 o'clock.

The Court: You came back to Calexico with Mr. and Mrs. [31] Brown, and what happened after that? Where did you have dinner? A. In Mexicali.

The Court: What time did you finish?

A. About 7:00 o'clock.

The Court: Then what did you do?

(Testimony of Elizabeth J. Williams)

A. I went to bed.

Q. You went right back and went to bed after dinner?

A. Yes, sir.

The Court: Alone? A. Yes.

The Court: Mr. Williams didn't go with you?

A. He went back to the hotel, but he didn't go to bed.

The Court: All right.

Q. By Mr. Davis: After you went to bed, what?

A. Mr. Williams called me about 11:00 o'clock, and I got up.

The Court: You mean he went out of the hotel and left you in the hotel?

A. Yes, he walked around.

The Court: You said Mr. Williams called you?

A. I mean I was asleep, and he called me.

Q. By Mr. Davis: He came to your room and called you?

A. Yes, he came to my room and called me.

Q. And what happened?

The Court: Weren't you living in the same room? [32]

A. Yes, sir.

The Court: You mean he was in the room and woke you up? Is that what you mean by saying he called you?

A. Yes, sir.

Q. By Mr. Davis: Then what happened after he woke you up?

A. I got up and dressed.

Q. Where did you go?

A. We started over to Mr. and Mrs. Brown's; we were going over there.

(Testimony of Elizabeth J. Williams)

Q. Tell us everything that happened. Did anything happen on the way over to the Browns?

A. We walked to Browns, from the hotel, and there is when the hold-up is supposed to have occurred.

Q. Did the hold-up occur? A. No, sir.

Q. Did you stop there about two blocks from the hotel? A. Yes.

Q. Did you have any discussion? A. Yes.

Q. What was the discussion?

A. About the diamonds, that we should rush up to Mr. and Mrs. Brown's, and tell them we had been held up.

Q. What did you do? A. That is what we did.

Q. Did you rush to the Brown's house?

A. Yes, sir. [33]

Q. And go in? A. Yes, we did.

Q. And tell them you had been held up?

A. I told them we had been held up.

Q. Did you go to the police station? A. Yes.

Q. Who went with you?

A. Mr. and Mrs. Brown.

Q. Did you report to the police that there was a hold-up? A. Yes, sir.

Q. Did you make the report, or did Mr. Williams?

A. He did the talking.

Q. Did they question you at all? A. No, sir.

Q. Then what happened in the police station?

A. They just took down the report.

Q. Right after you reported to the police, did you ever go back after that to the police station?

A. I think Mr. Williams went back early the next morning.

Q. You didn't? A. No, I didn't.

(Testimony of Elizabeth J. Williams)

Q. Was there any hold-up or robbery or any jewel theft in Calexico on December 31, 1939?

A. No, sir. [34]

Q. What did Mr. Williams say to the Browns when you went in?

A. He says, "We have just been held up by a tall man and a short man."

Q. Did he tell what he had lost? A. Yes, sir.

Q. Did you say anything to the Browns?

A. I don't recall saying anything.

Q. Then when did you come back to Los Angeles?

A. The following day.

Q. That would be January 1, 1940? A. Yes.

Q. New Year's Day? A. Yes, sir.

The Court: You said you had some conversation with your husband before you left Los Angeles about the trip to Mexico. What was supposed to happen?

A. A robbery.

The Court: That was before you left Los Angeles?

A. Yes.

The Court: What was said? Whose idea was it? Was it your idea?

A. No. It was Mr. Williams'. He wanted the money to play the market.

Q. What did he say to you?

A. He came home and told me that he wanted to collect [35] the money on the diamonds, because he needed it in the market.

Q. What did you say?

A. Well, I don't recall just exactly what I said.

Q. Well, the substance of what you said? Nobody remembers exactly what they said, or very seldom, anyway.

(Testimony of Elizabeth J. Williams)

A. We just talked, and he said he needed the money, and that if the market went up he would pay it back, he would make it right with the insurance company.

The Court: When did this idea come out about the robbery? Did he say he had it all planned?

A. He had been talking about it a couple of weeks.

The Court: He had mentioned it to you before?

A. Yes, sir.

The Court: When did he first suggest it to you?

A. One night at Burbank he said, "This would be a good place for a hold-up."

The Court: Anything else? A. I don't recall.

The Court: Why did you think he was talking about a hold-up of your jewelry when he said, "This would be a good place for a hold-up"?

A. That was the only thing we had that he could collect money on.

The Court: When he said, "This would be a good place for a hold-up," what made you think he meant a fake hold-up? Had he said anything about it? [36]

A. Yes, he talked about—

The Court: What did he say?

A. Your Honor, he needed money in the market, and he said we could get four thousand and some dollars on my rings and his rings.

The Court: Yes. And what?

A. Well, he mentioned the Calexico trip, and that is what we went down there for.

The Court: What did you say to him about it and what did he say to you? Did you say anything before you left about having a fake hold-up in Calexico?

A. Yes, we talked about it.

The Court: What did you say and what did he say?

(Testimony of Elizabeth J. Williams)

A. We talked about the possibility of making the trip, and he said that, as an attorney, he could get us out of it. That is about it.

The Court: What did he say about having a hold-up down there?

A. He had planned on having the hold-up on the way to Mr. and Mrs. Brown's house.

The Court: From the hotel? A. Yes, sir.

The Court: That is what he said before you left?

A. Yes, sir.

The Court: Didn't you discuss it at all?

A. Yes, I suppose we did. [37]

The Court: Didn't you have any ideas about how to have a hold-up?

A. No, I didn't have any. He did most of the talking, and I just—

The Court: You didn't question him? I haven't been married to him, and you were his wife at the time, and I am trying to find out what your conversation was.

A. Your Honor, I know it was wrong.

The Court: I am not talking about whether it was wrong. All I want to know is what he said to you and what you said to him.

A. Before we went to Calexico he had lunch downtown, and he came home and asked me if I had ever been to Calexico, and I said yes, that I had, and he said, "We are going down," and I had been ill, and, as I told you, that is what we went down for.

The Court: Is that what he told you? A. Yes.

The Court: What did he say?

A. That we were going to go down there and collect the money on the diamonds and going to have a fake hold-up.

(Testimony of Elizabeth J. Williams)

The Court: Did you ask him how he was going to stage this fake hold-up? A. Yes.

The Court: And what did he say?

A. He said he would have a story about it. [38]

The Court: I think probably it might be appropriate to have a short recess.

(Short recess.)

Q. By Mr. Davis: Mrs. Williams, you say this matter of having a fake hold-up had been discussed for some time before you went to Calexico? A. Yes.

Q. The purchase of this ring at the Chinese store for \$1.95 or \$2.95, that ring, did that figure in the discussion about the fake robbery? A. Yes.

Q. State what was said about it by him and what was said by you?

A. He said most people didn't know a diamond, and he got it to substitute for my engagement ring.

Q. Was it explained that you should wear it to Calexico? A. Yes.

Q. Will you tell us where that store was where you bought it?

A. It was on the south side of Hollywood Boulevard. I don't know what block.

Q. Was any disposition made of these jewels and watches that are mentioned in the policy before you went to Calexico? A. Yes, there was. [39]

Q. Before you went to Calexico what did you do with the rings and watches and bracelet?

A. Mr. Williams took two pieces of board about that long (indicating), and—

The Court: The record will show that the witness is indicating a distance.

(Testimony of Elizabeth J. Williams)

Mr. Davis: Go ahead.

The Court: Two pieces of board about that long?

A. Yes—2x4s, and he chiseled a hole out of the middle of each board.

The Court: And then what?

A. He put the diamonds in a handkerchief and put them in there, and put plaster of paris on top of them to hold them in.

Mr. Penney: I didn't hear her.

Mr. Davis: Speak a little louder, please.

The Witness: May I have a drink of water?

The Court: Yes, you surely may.

Q. By Mr. Davis: Where did he get the boards, do you know?

A. From an unfinished room off of our dressing room.

Q. In your house? A. Yes, on La Sombra.

Q. After he had done the chiseling and put the plaster of paris on it, what did he do?

A. He put two nails in it, one on each end of the [40] board.

Q. Then what did he do with the result?

A. He put them in the unfinished room that I was speaking of, off of my dressing room.

Q. Were there any other boards in there?

A. It is an unfinished room, and little pieces of board were left back there.

Q. Did you see him put them there?

A. I was in bed, but I knew what he was doing.

Q. Did he tell you where he had put them?

A. Yes, sir.

Q. Were they in that unfinished room off the dressing room when you left Los Angeles to go to Calexico?

A. They were.

(Testimony of Elizabeth J. Williams)

Q. After you had come back to Los Angeles on January 1, 1940, was anything said—you came back on January 1, 1940? A. Yes.

Q. Was anything said about what he was going to do from then on about any insurance claim?

A. Yes. He put in a claim.

Q. Did he tell you he was going to? A. Yes.

Q. Did you go to the insurance office, any insurance office, with reference to this matter?

A. No, I didn't. [41]

Q. Did he tell you what he had done? A. Yes.

Q. Did he tell you he had gone to Toplis & Harding?

A. Yes, sir.

Q. And that Toplis & Harding were adjusters for the insurance company? A. Yes, sir.

Q. Did he tell you that he reported the loss as a robbery? A. Yes.

Q. Did he tell you what he had told the insurance company about how the robbery happened?

A. I had heard him tell it to the police, so I suppose he told them the same.

Q. Did he tell you that he told the same story to Toplis & Harding that he told the police?

A. Yes, sir.

Mr. Penney: Will the witness keep her voice up, please?

The Witness: I will try.

Q. By Mr. Davis: Did Mr. Williams bring any documents to you to be signed? A. Yes, sir.

Mr. Davis: I would like to have these two documents marked for identification.

The Court: They will be marked Plaintiff's Exhibits 5 and 6. They are claims? [42]

(Testimony of Elizabeth J. Williams)

Mr. Davis: They are proofs of loss, yes.

The Court: Two of them?

Mr. Davis: Two proofs of loss. I call attention to the fact that the documents are marked Plaintiff's Exhibits 1 and 2. These were evidently used in the deposition of Sydney Williams, and for some reason didn't get in, so we might just as well strike out that marking. There are two separate policies. Plaintiff's Exhibit 5 for identification purports to be a sworn statement of proof of loss under policy SPF 303653. Exhibit 6 for identification purports to be a sworn statement of proof of loss under policy IMJ 67001. They are both directed to the Continental Insurance Company.

The Court: And both are signed by both parties?

Mr. Davis: Both signed by both parties.

The Court: Both defendants?

Mr. Davis: Yes, your Honor.

Q. By Mr. Davis: Mrs. Williams, I am going to hand you first Plaintiff's Exhibit No. 5 for identification, and will ask you if that is a document which you signed?

A. Yes, it is.

Q. And that is your signature? A. Yes, sir.

Q. Do you know whether or not the other signature is that of Mr. Williams? A. It is. [43]

Q. I also hand you Plaintiff's Exhibit No. 6 for identification, and ask you if the signature appearing at the bottom is your signature? A. Yes, it is.

Q. And the other signature is that of Sydney M. Williams? A. Yes, sir.

Q. Where were you when you signed these two documents? A. I was at home.

Q. Did you go out or go before a notary?

A. No, I didn't.

(Testimony of Elizabeth J. Williams)

Q. What did you do with them after you signed them? A. Gave them to Mr. Williams.

Mr. Davis: Do you want to stipulate that these were presented to the insurance company?

Mr. Penney: Yes, I will stipulate that they were presented to the insurance company, and, acting upon those proofs of loss, which were presented, payment was made.

Mr. Davis: I will offer the two documents as Plaintiff's Exhibits 5 and 6.

The Court: Admitted.

[PLAINTIFF'S EXHIBIT NO. 5]

Policy Number	Amount of Policy
SPF 303653	\$8,000.00
Agency at	Expiration
Los Angeles, Calif.	September 1st, 1942

SWORN STATEMENT
in
PROOF OF LOSS
to the
CONTINENTAL INSURANCE COMPANY

By Your Policy of Insurance Above Described, You Insured Sydney M. Williams and Elizabeth J. Williams according to the terms and conditions contained therein, the below mentioned property against loss from the following causes:

Property Insured Personal Property

Against Loss from all risks as per the above numbered policy form.

(Plaintiff's Exhibit No. 5)

A holdup occurred in the City of Calexico, Calif. on the 31st day of December 1939, about the hour of 10:30 o'clock P. M., which, upon the best of our knowledge and belief, was caused as follows: On the above date, while we were walking on a public sidewalk in the above City, an armed bandit demanded that we give him the property listed on this Proof of Loss, as well as property insured under Continental Insurance Company Policy IMJ 67001. Efforts toward recovery were without success.

The actual cash value of the property described by aforesaid policy, the actual amount of loss or damage, the total insurance thereon at the time of said loss and damage as shown by annexed schedule, and the amount claimed under this policy are as follows:

Cash Value	Whole Loss	Whole Insurance	Amount Named in This Policy	Amount Claimed Under This Policy
\$8,000.00	\$521.00	\$8,000.00	\$8,000.00	\$300.00

¶

We Hereby Make Claim Upon the Insurers Hereunder in the Sum of \$300.00 in Full and Final Settlement of and

Loss or Damage Referred to and Hereby Authorize Payment to Nil Except as noted below the property described belonged at the time of said loss to us and no other person or persons had any interest therein; no assignment or transfer, or incumbrance of said property has been made and no change in the title, use, or possession of said property has occurred since the issuance of said policy, except No exceptions In consideration of the payment to be

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made hereunder we hereby assign and transfer to the said

(Plaintiff's Exhibit No. 5)

Insurers each and all claims and demands against any person, persons, corporation or property, arising from or connected with such loss or damage, (and the said Company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons, corporation or property in the premises), to the extent of the amount above named; and agree to immediately notify Toplis and Harding, Inc. (for account of the Underwriters) in case of any recovery of the property for which

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claim is being made hereunder. We also agree to turn over to said Toplis and Harding, Inc. for account of the Insurers, any such recovery which may be made, or reimburse said Toplis and Harding, Inc. to the extent of the payment for such property which may be recovered. The said loss was not caused by design or procurement on our part; nothing has been done by or with our privity or consent to violate the conditions of this policy, or render it void, no articles are mentioned herein or in annexed schedules, but such as were interested in the loss and insured under this policy, and belonged to us at the time of said loss; no property saved has been in any manner concealed, and no attempt to deceive the said Insurers as to the extent of said loss has in any manner been made.

Special Conditions

Any other information that may be required will be furnished upon request, and considered a part of this proof.

It is expressly understood and agreed that the furnishing of this blank to the Assured or the preparing of Proofs by an adjuster, or any agent of the Insurers

(Plaintiff's Exhibit No. 5)

named in the policy is not a waiver of any rights of said Insurers.

Witness our hand at Los Angeles this 19th day of February 1940.

SYDNEY M. WILLIAMS
ELIZABETH J. WILLIAMS
Signature of Assured

County of Los Angeles

State of California—s.s.

Personally appeared before me, the day and date above written Sydney M. and Elizabeth J. Williams signer of the foregoing statements, who made solemn oath to the truth of same, and that no material fact is withheld of which said Insurers should be advised.

PEARL E. BLEWETT (Seal)
Notary Public.

Notary Public in and for the County of
Los Angeles, State of California.

My Commission Expires Feb. 26, 1940.

Statement of Loss

Loss of:

One diamond friendship ring, large center with
fourteen small round stones set in platinum—\$300.00

One wrist watch, Gruen Curvex, yellow gold
case, gold disk and numerals, brown leather
band—\$125.00

Cash Money—\$96.00	Policy Limit	\$250.00
	Policy Limit	50.00

Amount of Claim	\$300.00
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TOPLIS AND HARDING, Inc.

By

(Plaintiff's Exhibit No. 5)

Claim No. LA 4-40 B

SWORN STATEMENT

in

PROOF OF LOSS

to the

CONTINENTAL INSURANCE COMPANY

Insured Sydney M. Williams and Elizabeth J. Williams
Agency Los Angeles

Policy No. SPF 303653

Amount of Policy.....	\$8,000.00
Amount Claimed	\$ 300.00
Amount Paid	\$ 300.00
Adjusting Expense	\$

Date of Loss December 31, 1939.

TOPLIS AND HARDING, Inc.

International Adjusters

Established 1790

610 So. Broadway

Los Angeles

No.....

Case No. 2738-PH. Continental vs. Williams. Plfs.
Exhibit No. 5. Date Dec. 12, 1944. No 5 in evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. J. M.
Horn, Deputy Clerk.

[Endorsed]: Filed May 4, 1945. Paul P. O'Brien,
Clerk.

[PLAINTIFF'S EXHIBIT NO. 6]

Policy Number	Amount of Policy
IMJ 67001	\$3,950.00
Agency at	Expiration
Los Angeles, Calif.	June 2nd, 1940

SWORN STATEMENT

in

PROOF OF LOSS

to the

CONTINENTAL INSURANCE COMPANY

By Your Policy of Insurance Above Described, You Insured Sydney M. Williams and Elizabeth J. Williams according to the terms and conditions contained therein, the below mentioned property against loss from the following causes:

Property Insured Jewelry and Furs

Against Loss from all risks as per the above numbered policy form.

A holdup occurred in the City of Calexico, Calif. on the 31st day of December 1939, about the hour of 10:30 o'clock P. M., which, upon the best of our knowledge and belief, was caused as follows: On the above date, while we were walking on a public sidewalk in the above City, an armed bandit demanded that we give him the property listed on this Proof of Loss, as well as property insured under Continental Insurance Company Policy SPF 303653. Efforts toward recovery were without success.

The actual cash value of the property described by aforesaid policy, the actual amount of loss or damage, the total insurance thereon at the time of said loss and damage as shown by annexed schedule, and the amount claimed under this policy are as follows:

(Plaintiff's Exhibit No. 6)

Cash Value	Whole Loss	Whole Insurance	Amount Named in This Policy	Amount Claimed Under This Policy
\$3,950.00	\$3,950.00	\$3,950.00	\$3,950.00	\$3,950.00

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We Hereby Make Claim Upon the Insurers Hereunder
in the Sum of \$3950.00 in Full and Final Settlement of
and

Loss or Damage Referred to and Hereby Authorize Pay-
ment to Nil Except as noted below the property described
belonged at the time of said loss to us and no other per-
son or persons had any interest therein; no assignment or
transfer, or incumbrance of said property has been made
and no change in the title, use, or possession of said prop-
erty has occurred since the issuance of said policy, except
No exceptions In consideration of the payment to be

I

made hereunder we hereby assign and transfer to the said
Insurers each and all claims and demands against any per-
son, persons, corporation or property, arising from or con-
nected with such loss or damage, (and the said Company
is subrogated in the place of and to the claims and de-
mands of the undersigned against said person, persons,
corporation or property in the premises), to the extent of
the amount above named; and agree to immediately notify
Toplis and Harding, Inc. (for account of the Under-
writers) in case of any recovery of the property for which

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claim is being made hereunder. We also agree to turn
over to said Toplis and Harding, Inc. for account of the

(Plaintiff's Exhibit No. 6)

Insurers, any such recovery which may be made, or reimburse said Toplis and Harding, Inc. to the extent of the payment for such property which may be recovered. The said holdup was not caused by design or procurement on our part; nothing has been done by or with our privity or consent to violate the conditions of this policy, or render it void, no articles are mentioned herein or in annexed schedules, but such as were interested in the loss and insured under this policy, and belonged to us at the time of said loss; no property saved has been in any manner concealed, and no attempt to deceive the said Insurers as to the extent of said loss has in any manner been made.

Special Conditions

Any other information that may be required will be furnished upon request, and considered a part of this proof.

It is expressly understood and agreed that the furnishing of this blank to the Assured or the preparing of Proofs by an adjuster, or any agent of the Insurers named in the policy is not a waiver of any rights of said Insurers.

Witness our hand at Los Angeles this 19th day of February 1940.

SYDNEY M. WILLIAMS

ELIZABETH J. WILLIAMS

Signature of Assured

(Plaintiff's Exhibit No. 6)

County of Los Angeles
 State of California—s.s.

Personally appeared before me, the day and date above written Sydney M. Williams & Elizabeth J. Williams signer of the foregoing statements, who made solemn oath to the truth of same, and that no material fact is withheld of which said Insurers should be advised.

PEARL E. BLEWETT (Seal)

Notary Public.

Notary Public in and for the County of
 Los Angeles, State of California.

My Commission Expires Feb. 26, 1940.

Statement of Loss

Loss of:

Item No. 1—One platinum diamond watch with diamond bracelet attachment containing 84 diamonds and two baguettes	\$ 350.00
Item No. 4—One diamond emerald bracelet set in platinum with one marquise center and 74 full cut diamonds, weight approx. 5 cts.	900.00
Item No. 5—One platinum diamond engage- ment ring, center stone weight 3 cts., also containing 8 baguette and 22 round dia- monds	1800.00
Item No. 6—One gent's diamond ring measur- ing scant 2 ct. center	900.00
Amount of Claim	\$3950.00
TOPLIS AND HARDING, Inc. By R. REYNOLDS	

(Plaintiff's Exhibit No. 6)

Claim No. LA 4-40 A
SWORN STATEMENT
in
PROOF OF LOSS
to the
ENTAL INSURANCE C

Insured Sydney M. Williams and Elizabeth J. Williams
Agency Los Angeles

Policy No. IMJ 67001

Amount of Policy.....	\$3,950.00
Amount Claimed	\$3,950.00
Amount Paid	\$3,950.00
Adjusting Expense	\$ _____

Date of Loss December 31, 1939

TOPLIS AND HARDING, Inc.
International Adjusters
Established 1790

610 So. Broadway Los Angeles

No.

Los Angeles

Received Mar. 4, 1940. R. R. Manion.

Case No. 2738-PH. Continental vs. Williams. Plfs.
Exhibit No. 6. Date Dec. 12, 1944 No. 6 in evidence.
Clerk, U. S. District Court, Sou. Dist. of Calif. J. M.
Horn, Deputy Clerk.

[Endorsed]: Filed May 4, 1945. Paul P. O'Brien,
Clerk.

(Testimony of Elizabeth J. Williams)

Q. By Mr. Davis: Mrs. Williams, do you know what Mr. Williams did with those documents?

The Court: Do you know Pearl Blewett?

A. No, sir.

The Court: Did you ever meet her? [44]

A. Not that I know of. I don't recall meeting her.

The Court: Do you know a notary public by the name of Pearl Blewett? A. No, sir.

The Court: All right. Did you meet her or any notary public on or about the 19th day of February, 1940? A. No, I didn't.

The Court: Very well.

Q. By Mr. Davis: Did Mr. Williams tell you what he did with those documents after you signed them?

A. Yes, he did.

Q. What did he say he did with them? Did he tell you he gave them to the insurance company or the insurance company adjuster? A. Oh, yes.

Q. I don't know whether I asked you this or not. Did you ever meet or talk with any insurance adjuster or any representative of the Continental Insurance Company with reference to this loss prior to the time the loss was paid? A. No, sir.

Q. Did you ever talk with Nate Horowitz before the loss was paid? A. No.

Q. You knew that the insurance company subsequently, or on or about, or between the 2nd and the 8th day of March, 1940, paid the loss claimed for under these two proofs of [45] loss, did you? A. Yes.

Q. They paid the sum of \$3,950 under policy IMJ 67001, and the sum of \$300 under policy No. SPF 303653? You know that they paid those in those amounts? A. Yes.

(Testimony of Elizabeth J. Williams)

Q. And that was paid by draft? A. Yes, sir.

Q. And you endorsed the draft? A. Yes.

Q. Both drafts? A. Yes.

Q. It was paid by both drafts? A. Yes, sir.

Q. And you endorsed them both? A. Yes.

Q. And gave them to Mr. Williams?

A. Yes, sir.

Q. Do you know what he did with them?

A. He deposited them in the bank.

Q. In what bank? A. The California Bank.

Q. Do you know what became of the money?

A. He used it in the stock market.

Q. Following the payment of this loss in March, 1940, did you ever see the items we have been discussing again, the [46] items scheduled in that list you have there? A. Yes, sir.

Q. Just tell what happened after that. First, did they remain up in that attic room for any length of time?

The Court: She said an unfinished room.

Q. By Mr. Davis: Was this an attic room?

A. Yes, it was an attic room.

The Court: Was it an attic room in an upper story?

A. Yes, sir.

Q. By Mr. Davis: Did they remain there for any length of time after the alleged robbery and after the payment?

A. Yes. They remained there until the latter part of May or the first of June.

Q. Of 1940? A. 1940.

Q. How did you know they were there?

A. Well, he put them there, and then he took them out again.

(Testimony of Elizabeth J. Williams)

The Court: That is when he took them out; is that what you mean? A. Yes.

Q. By Mr. Davis: You knew they were there, because they hadn't been disturbed until he took them out the latter part of May or the first of June, 1940?

A. Yes, sir.

Q. Have you any way of fixing the approximate date [47] that they were taken out?

A. It was not long before—it was, I imagine, a month before I went east on a trip.

Q. When did you go east?

A. The latter part of June.

Q. The latter part of June, 1940? A. Yes.

Q. Was anything said by him to you or by you to him about taking the jewels out of this unfinished room?

A. Mr. Williams and I had separated—

The Court: When? A. The 8th of May.

The Court: 1940? A. 1940.

The Court: All right. Go ahead with what you said and talked about then.

A. And he was living in an apartment hotel, and I was living at the house, and he had just opened his law office again.

The Court: Had he closed it? A. Yes.

The Court: When?

A. The first part of 1939. And he came up to the house and said we were going to have the diamonds broken up.

Q. By Mr. Davis: Did he state why?

A. No, I don't think so. [48]

Q. To dispose of them or sell the stones, or anything of that kind?

(Testimony of Elizabeth J. Williams)

A. I don't know what reason he had for breaking them up.

The Court: He didn't say? A. No.

Q. By Mr. Davis: He said they had to be broken up? A. Yes.

Q. What was done? How were they to be broken up, or who would break them up?

A. He didn't know anybody, and he asked about Mr. Leitch's laboratory in San Diego.

Q. Who was Mr. Leitch?

A. He was a dental technician.

Q. And he was in business, operating a laboratory, in San Diego, at that time? A. Yes, sir.

Q. Mr. Leitch was a friend of yours?

A. Yes. I had known Mr. Leitch several years.

Q. Had Mr. Williams known Mr. Leitch?

A. He had met him two or three times.

Q. And you and Leitch were friends? A. Yes.

Q. Just what was said about him, about having him break these up?

A. He asked me if I thought Mr. Leitch could do it, [49] and I said I thought he could.

Q. Did you go to San Diego? A. Yes, we did.

Q. Just tell us about your trip.

A. He came up to the house and got the diamonds and—

Q. He took them out of this—

A. Out of the unfinished room in the attic.

Q. Were they still in the board? A. Yes, sir.

Q. And he brought them out?

A. Yes, sir. And we went down on the boat—

Q. Where was the boat? A. In Balboa.

Q. Was it a big boat? A. No, a small boat.

(Testimony of Elizabeth J. Williams)

Q. A cruiser?

A. A 32-foot boat. And he separated the boards down on the boat and took the diamonds out, and we took them to San Diego.

Q. When he separated the boards and took the diamonds out, what did he do with the boards?

A. He put them in the car.

Q. What happened then?

A. After we had had the diamonds—after we left Mr. Leitch's laboratory—

Q. On your way down, I mean, where were the boards? [50] A. In the back of the car.

Q. And then you went to Mr. Leitch's laboratory?

A. Yes.

Q. Where was that laboratory located?

A. On University Avenue.

Q. In San Diego? A. Yes, sir.

Q. What sort of a conveyance did you go to San Diego in? A. We went in a Dodge coupe.

Q. Who drove? A. Mr. Williams.

The Court: From where? A. From Balboa.

Q. By Mr. Davis: You were on the boat?

A. No, sir. We went to the boat.

Q. Do you know what kind of tools were used?

A. He had a hammer and a screwdriver and a small iron chisel, I guess.

Q. What did Mr. Williams do when you got to San Diego?

A. He parked the car around the corner from University Avenue.

Q. On University Avenue?

A. No—just off of University Avenue.

Q. Do you know the name of the street?

(Testimony of Elizabeth J. Williams)

A. No, I don't. [51]

Q. And what did you do? A. He sat in the car.

Q. What did you do?

A. I took the diamonds up to Mr. Leitch's and asked him to break the diamonds up for us.

The Court: When Mr. Williams took the diamonds out of the board, you mean he took out the jewels then?

A. No.

The Court: So when you took them up to the dentist they were still in the settings? A. Yes.

The Court: In the same condition as described in the list? A. Yes, sir.

Q. By Mr. Davis: Did you take and present to Mr. Leitch all of the articles that are mentioned in that list that you have before you, from which you have been reading? A. Yes, sir.

Q. Do you understand me? Have you got your list there before you? A. Yes, I have.

Q. Which of the items that are mentioned there did you take to Mr. Leitch?

A. The watch and the wedding—no—the friendship ring—I had on my wedding ring.

The Court: That wasn't put in the board? [52]

A. No, sir. And No. 3 and No. 4 and No. 5 and No. 6.

Q. By Mr. Davis: You took 3, 4, 5 and 6?

A. I took 1, 3, 4, 5 and 6.

Q. Did he break up the platinum diamond watch?

A. No, nor the friendship ring.

Q. He didn't break up No. 3 or No. 1?

A. That is right. I asked him if he could break them up for us.

(Testimony of Elizabeth J. Williams)

The Court: Had he ever done anything like that before for you? A. No, sir.

The Court: Why did he do it? A. I asked him.

The Court: Did he ask you why you wanted them broken up? A. No, sir.

The Court: Did he say anything at all about it?

A. No. I just asked him to.

The Court: Did you tell him why you wanted them broken up? A. No.

The Court: Did he say he couldn't break up 1 and 3?

A. No. Mr. Williams didn't want them broken up.

The Court: But you took them up to Leitch's office just the same? A. Yes, sir. [53]

Q. By Mr. Davis: Did Mr. Leitch break them up?

A. Yes, he did.

Q. Did you see him break them up?

A. Yes, I did.

The Court: You stayed there, then? A. Yes.

Q. By Mr. Davis: About how long were you up there while he was breaking them up?

A. Oh, I should judge two or two and a half hours.

Mr. Penney: How long?

A. I should judge two or two and a half hours.

Q. By Mr. Davis: Did you see what he used to break them up? A. Yes, sir.

Q. What did he use?

A. Emery wheels—the wheels that he used in his work.

Q. Did you see anyone else present while Mr. Leitch was breaking them up? A. Yes, sir.

Q. Who was present?

(Testimony of Elizabeth J. Williams)

A. A man that was working for Mr. Leitch, and Mr. Jones, and later Mrs. Jones came in. Mr. Jones came up later. He wasn't there when I arrived.

The Court: Mr. and Mrs. Jones, and another man?

A. And Mr. Leitch. [54]

Q. By Mr. Davis: You knew Mr. and Mrs. Jones?

A. Yes, sir.

Q. But you didn't know them very well?

A. No.

Q. After the jewels were broken up what became of the stones? A. I put them in my handkerchief.

Q. What did you do with them?

A. And Art walked down to the car with me.

The Court: Mr. Leitch? A. Yes, Mr. Leitch.

Q. By Mr. Davis: Was Mr. Williams there when Mr. Leitch went down to the car? A. Yes, sir.

Q. And did Mr. Williams and Mr. Leitch speak to each other?

A. Yes; they shook hands, and Mr. Williams thanked Mr. Leitch for breaking them up.

The Court: Did you take the settings back?

A. No.

The Court: You left those with Mr. Leitch?

A. Yes, sir.

The Court: Then what did you do—come back to Los Angeles? A. Yes, sir.

Q. By Mr. Davis: What was done with the stones? [55]

A. Just before we got to La Jolla I threw them out of the car.

Q. The stones?

A. No. I thought you said the boards.

(Testimony of Elizabeth J. Williams)

Q. What did you do with the boards, first?

A. Just before we got into La Jolla I threw them out of the car.

Q. In the country or in the city?

A. It was out in the country.

Q. Then what did you do with the stones when you left San Diego and you had them in your handkerchief—did you? A. Yes, sir.

Q. In your handkerchief? A. Yes, sir.

Q. Where did you put them? Where did you carry them?

A. I carried them in my purse back to Los Angeles.

Q. Did you carry them in your purse all the way back to Los Angeles? A. Yes.

Q. When you got to Los Angeles what happened?

A. We put them in a small green tin box.

Q. A document box? A. Yes, sir.

Q. Were they still wrapped up in your handkerchief?

A. Yes, sir.

Q. Did you put them in the box or did Mr. Williams?

[56] A. Mr. Williams did.

Q. What became of the box? What did he do with the box, do you know?

A. He put it back in the same room that the diamonds had been in before.

Q. In the unfinished room? A. Yes, sir.

Q. Did you ever see those diamonds after that?

A. Yes, I did.

Q. How many times after that did you see them?

The Court: When did you next see them?

A. After I came back from the east.

Q. By Mr. Davis: Were they still in the box?

A. All but the watch and the ring.

(Testimony of Elizabeth J. Williams)

Q. What became of the ring and of this watch?

A. I had moved them to a different room.

Q. This watch and ring which weren't broken up?

A. Yes, sir.

Q. Where was the wedding ring? A. I wore it.

Q. You wore it all the time? A. Yes, sir.

Q. And you had moved these others into another room, and the loose stones were still in the box?

A. Yes, sir.

Q. Did you see them again after that? [57]

A. Yes, sir, I saw them.

Q. Did you ever show them to anybody?

A. Yes.

Q. Who did you show them to?

A. I showed them to Mrs. Berrenberg.

Q. Who was she?

A. She was a friend of mine.

Q. Do you know where she lives today?

A. Well, I knew up until two years ago. I don't know where she lives right now.

Q. How old a woman is she?

A. I should judge around 50.

Q. When did you show them to her?

A. Soon after I came back from the east—I imagine in August.

Q. You got them out of the box? A. Yes.

Q. What did you do with them after you showed them to her? A. Put them back.

Q. Then did you see them after that?

A. No, I didn't.

The Court: You never saw them again?

A. No.

Q. By Mr. Davis: Do you know what became of them? A. No, I don't. [58]

(Testimony of Elizabeth J. Williams)

Q. You say you and Mr. Williams separated in May?

A. Yes.

Q. About when did you come back from the east?

A. The last part of July, 1940.

Q. Did Mr. Williams have access to your house there during the period of separation? A. Yes, sir.

Q. I believe you said in October the divorce started, the divorce action? A. I believe that is right.

Q. And Mr. Williams had a key to the house?

A. Yes, sir.

Q. Was he in the house during the time between the time you separated and the divorce action?

A. Yes, at times.

Q. Many times? A. Yes.

Q. I understand you had a contested divorce?

A. Yes, sir.

Q. Do you know when the insurance company was first advised of this fake robbery? A. Yes, sir.

Q. Did you tell anybody about it?

A. I told Mr. Taylor.

Q. Do you know whether or not Mr. Taylor advised us, that is, the insurance company? [59]

A. Yes, he did.

Q. And, as a result, you were interviewed by myself and Mr. McAnally? A. Yes, sir.

Q. And you told the same story you are telling here now? A. Yes, sir.

Q. At the time you were in Calexico you were wearing your wedding ring? A. Yes, sir.

Q. This \$1.95 diamond ring, or the ring—

A. Yes, sir.

Q. And that is the only ring you really were wearing? A. Yes, sir.

(Testimony of Elizabeth J. Williams)

The Court: What became of that \$1.95 ring? What did you do with it?

A. We disposed of it on the way over to Mr. and Mrs. Brown's.

The Court: What do you mean you disposed of it?

A. Threw it away.

The Court: Broke it up? A. No, sir.

The Court: Just threw it away? A. Yes.

The Court: And continued to wear your engagement ring, did you? [60] A. My wedding ring.

The Court: All right.

Mr. Davis: I think you may inquire. You may cross examine. [61]

* * * * *

Q. By Mr. Davis: Mrs. Williams, you testified this morning that there were two pieces of jewelry, the friendship ring and the watch with the bracelet attachment, that you had taken out of this box with the other jewelry and put in another room in the house? A. Yes, sir.

Q. What did you do with that jewelry, those two pieces? A. I put them up in the maid's room.

Q. And later what did you do with them?

A. I gave them,—

Q. I have them in my possession. How did I get them? A. I gave them to Mr. Taylor.

Q. Do you know whether or not he gave them to me? [62] A. Yes, sir.

Q. Did he give them to me in your presence?

A. Yes, sir.

Q. And with your consent? A. Yes, sir.

Q. I will hand you a watch, with a bracelet attachment, and ask you if that is the item referred to as item No. 1 in the policy and in the copy of the list which I give you for your assistance, Exhibit 1 for identification?

Mr. Davis: As long as we have used this, I think we had better offer it in evidence, your Honor.

The Court: All right. It is admitted as Plaintiff's Exhibit No. 1 in evidence.

[PLAINTIFF'S EXHIBIT NO. 1.]

Item No.	Description of Items	Amount of Insurance
1.	One Platinum Diamond Watch with diamond bracelet attachment containing 84 Dias. & 2 Baguettes	\$ 350.00
2.	One Platinum Diamond Wedding Ring with 11 Diamonds	50.00
3.	One Diamond friendship ring, large center with 14 smaller round stones set in platinum	300.00
4.	One Diamond & Emerald Bracelet set in Platinum with 1 Marquise center & 74 full cut dias. weighing approx. 5 carat.....	900.00
5.	One Plat. Diam. engagement ring center stone weighing approx. 3 carat also containing 8 baguettes & 22 round diamonds.....	1800.00
6.	One gents Diam. Ring measuring scant 2 carat center	900.00
		<hr/>
		\$4300.00

Appraised by E. M. Lipetz—6/23/39—Los Angeles, Calif.

Case No. 2738-PH. Continental vs. Williams. Plfs. Exhibit No. 1. Date Dec. 12, 1944, No. 1 in evidence. Clerk, U. S. District Court, Sou. Dist. of Calif.; J. M. Horn, Deputy Clerk.

[Endorsed]: Filed May 4, 1945. Paul P. O'Brien, Clerk.

(Testimony of Elizabeth J. Williams)

Mr. Davis: Do you understand my question?

The Court: No. 1 in evidence is the list of items.

A. Yes. This is the one.

Q. By Mr. Davis: Is that the watch described there?

A. Yes, sir.

Q. Now I will hand you another piece of jewelry and ask you if that is the piece of jewelry that is described as item No. 3 in Exhibit 1 and in the policy?

A. Yes, it is.

Mr. Davis: I will offer those two items in evidence.

The Court: Do you want them in evidence?

Mr. Penney: I have no objection.

The Court: You have no objection? [63]

Mr. Penney: None whatever.

The Court: The point that I am making is that, if you don't offer them in evidence, you can leave them for the purposes of the trial, and then can return them. They will be admitted in evidence for the time being.

Mr. Davis: And we will be responsible for them. They belong to her, but the plaintiff is responsible for them.

The Court: Very well.

Mr. Taylor: Are they admitted under one number, your Honor?

The Clerk: The watch is admitted as No. 7.

The Court: And the ring is No. 8. That is No. 2.

The Witness: I have No. 3 on mine.

The Court: One diamond friendship ring?

The Witness: Yes, sir.

The Court: Is that what you call it?

The Witness: Yes.

Mr. Davis: Mr. Penney may cross examine. I have three other witnesses here, and one of the witnesses has a business of his own.

The Court: You say one of the witnesses is what?

Mr. Davis: I say one of them is running a business of his own, and one of the other witnesses is employed in an aircraft factory. And I would like to put them on out of order, if there is no objection.

The Court: There is no objection on my part, if [64] counsel has no objection.

Mr. Penney: I don't want to cross examine her until she has signed the deposition which was taken Sunday. I would like to have her read that deposition and sign it.

Mr. Davis: You mean you don't want to cross examine her at all?

Mr. Penney: No, not until she reads this deposition.

The Court: If you have no objection, counsel can bring these other witnesses on out of order, so that they can be released.

Mr. Penney: I am taken by surprise by a lot of the testimony, and would like to have those witnesses remain right here in this courtroom.

The Court: If you have no objection to this testimony being taken out of order—

Mr. Penney: No, your Honor.

The Court: You have concluded your direct?

Mr. Davis: Yes, I have concluded the direct.

The Court: You may stand down.

The Clerk: The ring is Exhibit No. 8 and is admitted in evidence?

The Court: Yes; the ring is No. 8, and is admitted in evidence. [65]

ARTHUR STANLEY LEITCH,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Arthur Stanley Leitch.

The Court: And your address?

A. 4025 North Hempstead Circle, San Diego.

Direct Examination

Q. By Mr. Davis: That is San Diego?

A. Yes, sir.

Q. What is your business, Mr. Leitch?

A. I have a dental laboratory in San Diego.

Q. How long have you been in business?

A. 13 years.

Q. In San Diego, California? A. Yes, sir.

Q. And that is a laboratory where you do work for dentists? A. That is right.

Q. Do you know Mrs. Williams? A. I do.

Q. How long have you known her?

A. About 10 years.

Q. Do you know Sydney Williams? A. I do.

Q. How long have you known him? [66]

A. Oh, possibly—well, I can't say for sure. I don't know the date.

The Court: As long as you have known her?

A. No, sir.

Q. By Mr. Davis: Did you meet him before or after they were married? A. After they were married.

Q. Directing your attention to an occasion, a time in the late spring of 1940, do you recall seeing Mrs. Williams and Mr. Williams in San Diego, possibly the latter part of May, or from the middle of May to the first part of June? A. Yes, sir, about that time.

(Testimony of Arthur Stanley Leitch)

Q. Where did you see Mrs. Williams?

A. She came to my laboratory.

Q. Where is your laboratory located?

A. Thirtieth and University.

Q. Did you have any conversation with her?

A. Yes.

Q. To what did the conversation relate?

Mr. Penny: This testimony is binding upon her. It is not binding on Mr. Williams.

The Court: Yes.

Mr. Penney: And I have no objection to her testifying, with that understanding. They were conversations with her, but not in his presence.

Mr. Davis: We are entitled to the testimony. [67]

The Court: Yes, you are entitled to the testimony, but at the present time I don't know whether sufficient foundation has been laid or not. Her testimony was that she went to the office of the witness at the instance and request of her husband, Mr. Williams. In any event, the testimony will be admitted subject to your right to argue a motion to strike.

Q. By Mr. Davis: State the substance of the conversation had at that time.

A. She asked me if I could do something for her, and produced some jewels which she asked me if I could take the stones out of.

Q. Do you remember what the jewels were?

A. Well, I can't outline all of them. I remember that the ones that I was able to take the stones out of, or did, because she wanted me to, were two rings and a bracelet.

Q. Was anybody present at that time?

(Testimony of Arthur Stanley Leitch)

A. Yes. I had three men in my office, employees, and they were present, and while I was doing it my sister came in and she was present.

Q. Is your sister the wife of one of the employees?

A. Yes.

Q. Mr. Jones?

A. Mr. Jones is one of my employees.

Q. And the other employees who were there at that time, where are they now? [68]

A. One of them is in the Navy. He is a dentist now.

The Court: What is his name?

A. James Frame. And the other one is Lewis Lloyd. He is employed in another laboratory in San Diego at present.

Q. By Mr. Davis: Those were the only ones that were there?

A. Other than Mr. Jones. Mr. Jones was there.

Q. Was anything said as to why these jewels should be broken up?

A. I think I recall the conversation on my asking why they were, and I believe the explanation was at the time that they needed money, and that they could obtain more money from the stones out of the settings than in the settings.

Q. That is what she said?

A. That is as close as I can recall what was said.

Q. Did you take the stones out of these three items that you mentioned? A. Yes, I did.

Q. Tell us what you did.

A. I don't know anything about stones or jewelry. So I thought I could take them out with what we call side cutters or wire cutters that I had in the laboratory, and I found the bracelet was soft enough to take the little

(Testimony of Arthur Stanley Leitch)

stones out of it, but the bracelet had a couple of green stones in it, and I couldn't take those out with the pliers, so I had some high speed instruments that we use to handle chrome [69] metal, and I was able to cut around the margins of the stones, to get them out that way.

The Court: What about the ring stones? Did you have any difficulty with those?

A. No. I used a lathe on those.

Q. By Mr. Davis: You say you did use a lathe on the ring settings? A. Yes, sir.

Q. What happened to the mountings after you took the stones out?

A. The ones that I had cut, of course, were pretty well broken up, and the ones I had used the pliers on were bent, and, knowing the scrap metal we use in the laboratory, it didn't have any great value in it, and, as I recall now, Mrs. Williams mentioned keeping it, and we attempted to melt it down, so that I could throw it in the scrap kettles that we have in the place, and all of it melted down but the man's ring, and that I don't think was platinum; I think it was gold, because we couldn't melt it down with an acetylene torch, and we put everything in the scrap kettle.

Q. Then what did you do with it?

A. When we turned in our metal, I turned it in to the refiners, and by the time the refiners got through there was a lot of metal there that was non-precious metal. It surely wasn't gold.

Q. Directing your attention to Plaintiff's Exhibit 1, [70] which I think is laying there in front of you, directing your attention first to item No. 4, will you state whether or not that description describes a piece of jewelry which you cut up?

(Testimony of Arthur Stanley Leitch)

A. I believe the description fits, as close as I can recall it. I do recognize the emeralds, the little flat stones that were with the diamonds.

Q. Do you recall the description of it?

A. Yes.

Q. Do you recall the description of No. 5, the item which you cut up? A. I believe so.

Q. What do you recall as to the description of the article?

A. Well, it had many little stones, I don't recall how many, but as to the larger stone or the good-sized diamond, I do remember that.

Q. What about item No. 6?

A. It being a man's ring, I remember there was a man's ring. That is the one I mentioned that wouldn't melt down.

Q. Was that the one you mentioned that was set in harder metal, harder than the others? A. Yes.

Q. During the time that you were removing these stones, did Mrs. Williams leave the laboratory? [71]

A. Yes, she did. She went downstairs during the time I was taking care of this.

Q. Did she state why?

A. She told me she was going down to see Mr. Williams, and I asked her to bring him up, and when she came back she said he wouldn't come up. I remember, at the time she had been down, she brought up some drinks, coca-cola, for those that were there, and then she stayed until I completed it.

Q. After the jewels were removed from the settings what became of them?

A. She took them and put them in a handkerchief or some paper, one of the two.

(Testimony of Arthur Stanley Leitch)

Q. Then did she leave?

A. She left at that time, and I went downstairs with her to the car, where Mr. Williams was, and spoke to him for a moment, and they went on their way.

Q. What was said by Mr. Williams to you at that time, and by you to him? What conversation did you have?

A. I don't believe there was a lot of conversation. I remember we shook hands through the car, and he made some mention of my doing it; I believe he thanked me for doing it.

Q. Then you went back?

A. I went back to the office.

Q. And they went on in the car? A. Yes, sir.

Q. When was this matter next brought to your attention, [72] about cutting up this jewelry?

A. A couple of years ago, when you and some other gentlemen came down to San Diego to ask me about these descriptions.

Q. Did you talk to Mrs. Williams about us coming down? Mr. McAnally was the man, wasn't he?

A. I believe that was the name.

Q. An adjuster for the Continental Insurance Company? A. Yes.

Q. Had you talked to Mrs. Williams about that?

A. I had talked to her that morning, a short time before I met you.

Q. What did she say?

A. She mentioned that something had come up about these jewels, and a couple of men were coming down to ask me about the descriptions of them.

Q. At that time did you know what had come up?

A. No, sir.

(Testimony of Arthur Stanley Leitch)

Q. You knew it was something in relation to them?

A. I knew it was something in relation to the jewels. I didn't know what it was about.

Q. When did you first learn just exactly what it was all about? A. This morning. [73]

* * * * *

Cross Examination

Q. By Mr. Penney: Mr. Leitch, how long have you known Mrs. Williams?

A. Approximately ten years, thereabouts.

Q. Where were you living when you first met her?

A. On 32nd Street, I believe.

Q. San Diego? A. Yes, sir.

Q. Where was she living at that time?

A. I wouldn't know the address. I knew she lived here in Los Angeles.

Q. Did she live in San Diego at any time?

A. Yes, sir; she lived with us for a period of time after that.

Q. By "us," who did you mean?

A. I had my sisters come to live with me, and she came to live with us at that time.

Q. How many sisters did you have live with you at that time? A. Two.

Q. And how long did she live with you?

A. A matter of months. I couldn't say how many.

Q. When did she leave there?

A. I couldn't tell you the date.

Q. The approximate date? Can you give me the approximate date? [74]

A. I am afraid I couldn't, no.

(Testimony of Arthur Stanley Leitch)

Q. Can you give me the year?

A. I couldn't do that.

The Court: Can you figure it out?

A. It was the year of the San Diego Fair, and I don't even know what year that was, to be sure.

Q. By Mr. Penney: Can you give me within four years of when the San Diego Fair was?

A. I couldn't give you any of them at all.

The Court: You don't mean the 1915 Fair?

A. No. It was around the nineteen thirties.

Q. By Mr. Penney: Do you know whether or not she left there in 1930 or 1935?

A. I would say it was closer to 1935.

Q. Than it was to 1930? A. Yes.

Q. Then when did you next see her?

A. I believe I saw her at different times in Los Angeles here.

Q. How often did you see her in Los Angeles?

A. Oh, probably, maybe three or four times, and maybe a half dozen times.

Q. Between 1935 and 1940 you saw her how many times?

A. I would say approximately half a dozen times. I don't know exactly.

Q. When did you first meet Mr. Williams? [75]

A. The first time I met Mr. Williams was after Mrs. Williams and he were married.

Q. Do you know when they were married?

A. No, sir.

Q. Do you know whether or not they were married in 1936, when you were up here to visit her any time?

A. Yes, they were, because that was when I met Mr. Williams first.

(Testimony of Arthur Stanley Leitch)

Q. Sometime between 1935 and 1940?

A. Yes, sir.

Q. Can you give me within a year of when they were married?

A. I am afraid I couldn't. I know when I met him the first time, but I don't know the date or the time.

Q. When did you meet Mr. Williams the first time?

A. I met him at his business. They had a dress or garment manufacturing place, and I was up here at the time; and we can associate the date, because they just had had a fire at the establishment.

Q. Can you give me the date? A. No, I can't.

Q. You don't know whether it was 1938 or 1940?

A. I don't think it was as late as 1940.

Q. You don't know whether it was in 1938?

A. I wouldn't swear to that, no.

Q. Can you give me the month when you met him?

[76] A. No, definitely I couldn't.

Q. You don't know whether it was May or December? A. No, I don't.

Q. You told Mr. Davis that you had only met Mr. Williams once? A. Up to what time?

Q. Until the time that you met him in San Diego.

A. No, sir.

Q. Had you met Mr. Williams twice?

A. Twice.

Q. Where did you meet him on the second occasion?

A. He was handling a case for my sister in a little court outside of Los Angeles at the time.

Q. Were you present then?

A. I was. I drove up for the case.

Q. Do you recall the year in which he handled the case for your sister? A. I don't think I can.

(Testimony of Arthur Stanley Leitch)

Q. That was a drunk driving case, wasn't it?

A. That is right.

Q. And you had employed him for the purpose of assisting her?

A. He handled it. I don't know whether I employed him.

Q. You don't know whether that was 1936 or 1940?

A. I know it wasn't 1940 or 1936. It was in that [77] period of time.

Q. But you do know that Mr. Williams was down there with Mrs. Williams in the latter part of May or the first part of June, 1940?

A. I had things brought to my attention to make me associate it with this, yes.

Q. You had no occasion, from 1940 to 1942, two years later, to recall the date, had you?

A. Nothing at all.

Q. You had had no conversation at all with Mrs. Williams, had you? A. No.

Q. And sometime in 1942 Mrs. Williams called you; is that right? A. That is right.

Q. She was in San Diego at the time?

A. That is right.

Q. What did she tell you on that occasion?

A. She told me that something had come up about the jewelry, and she was having two men come over to ask me about the descriptions.

Q. Was that all she said? A. That is all.

Q. Can you describe the jewelry that Mrs. Williams brought to you without this exhibit in front of you?

A. Without refreshing my mind from that, I couldn't [78] describe it very well, other than being a couple of rings and a bracelet and another bracelet that I didn't take the stones out of.

(Testimony of Arthur Stanley Leitch)

Q. Do you know the difference between platinum and white gold? A. I think so. I handle platinum.

Q. Do you know the difference between diamonds and sapphires? A. Only in color.

Q. I said sapphires. I was thinking of emeralds. Do you know the difference between an emerald and a diamond? A. The color.

Q. What is the difference?

A. An emerald is green, I think.

Q. Which one is green?

A. I think it is the emerald, I believe.

Q. Are you sure about that? A. I believe so.

Q. I will ask you to look at Exhibit No. 7 and state whether or not those stones in there are diamonds or sapphires. Do you know?

A. No. I would judge they are diamonds.

Q. Do you know whether or not that is white gold or platinum? A. I would say it is platinum.

Q. You stated, I believe, Mr. Leitch, that you didn't [79] know anything at all about jewelry?

A. As jewelry, yes.

Q. Mrs. Williams told you that these stones would have a greater value out of their mountings than they would in the mountings?

A. That is what the conversation was at the time, yes.

Q. You didn't think you were doing anything dishonest, did you?

A. No, I had no reason to think I was. I thought it was their own business, what they wanted to do with it.

Q. Mr. Williams was not with Mrs. Williams, was he, in the office? A. No.

(Testimony of Arthur Stanley Leitch)

Q. What time did she arrive at your office?

A. Sometime in the early afternoon.

Q. What time?

A. I couldn't state the hour. It was late afternoon when they left. I did fool with them for a period of time, possibly a couple of hours.

Q. Did you have any emery wheels in there?

A. Yes, definitely.

Q. Did you cut this jewelry up with the use of emery wheels? A. Yes, carborundum disks.

Q. You didn't know whether or not at that time you were cutting diamonds or sapphires, did you? [80]

A. If they were white stones, I presumed they were diamonds.

Q. They could have been glass? A. Yes.

Q. And the green stones that you took out might or might not have been precious stones?

A. That is right.

Q. And you know, as a matter of fact, that the people whom you dealt with on precious metals objected to some of the flux in the metals, don't you?

A. That is right.

Q. When you came down to the car, there was no one on the outside of the car, was there? A. No.

Q. Whoever was there was on the inside of the car?

A. That is right.

Q. And it was dark when you came down, wasn't it?

A. It wasn't so dark that I couldn't detect who I was talking to.

Q. Was it dusk? A. Just about dusk.

Q. Was this a coupe or a sedan?

A. I thought it was a sedan.

(Testimony of Arthur Stanley Leitch)

Q. What kind of a sedan was it?

A. Knowing cars, I know it was a Dodge.

Q. A Dodge sedan? [81] A. Yes.

Q. Light or dark color?

A. I don't recall the color. It seems to me it was probably maroon.

Q. A maroon sedan? A. Yes.

Q. A maroon Dodge sedan?

A. Yes. It may have been a coupe. I thought it was a sedan.

Q. Didn't Mrs. Williams come down to the car and say, "I want you to say hello to Mr. Williams," or something to that effect?

A. I knew I was going down to meet him.

Q. You had been up with Mrs. Williams in the laboratory for how many hours?

A. A couple or three hours, probably more than that.

Q. More than three hours?

A. It may have been. I didn't work on it continually. I had other business to take care of. I didn't work on it continually.

Q. Could the person in that car have been someone else other than Mr. Williams? A. I don't think so.

Q. Could you be mistaken about the person you saw in that sedan?

A. Anybody could be mistaken, but I am quite positive [82] it was Mr. Williams.

Q. What, if anything, did you tell Mr. Davis as to the description of the articles that you broke up?

A. I don't quite follow your question. What do you mean, what did I tell him?

Q. You had to describe to Mr. Davis some articles, didn't you? A. I knew there were rings.

(Testimony of Arthur Stanley Leitch)

Q. What did you tell Mr. Davis?

A. I told him how I took the stones out of them.

Q. How many stones did you tell him you took out?

A. I don't know—a number.

Q. Did you tell him approximately how many?

A. No.

Q. Did you tell him what kind of stones they were?

A. Some were very small, probably chips, and a couple or three larger ones.

Q. How large were the large ones—did you tell him?

A. I didn't tell him.

Q. You had never broken up any stones before from settings, had you? A. No.

Q. What did Mr. Davis ask you? What was the first thing he said to you, and what did you say to Mr. Davis?

A. He was introduced to me first, and then he told me this other man that was with him was an investigator for the [83] insurance company, and that they had come down to have me give a description and tell them about the pieces I had taken the stones out of, and asked me about when it happened, and how many pieces there were.

Q. When did you tell him it happened?

Mr. Davis: I don't believe that is cross examination, what he told me. If he is going into conversations with me, it isn't proper cross examination.

The Court: Yes, it is, because you asked him if you didn't go down and see him.

Mr. Davis: Well, maybe I shouldn't have asked him that, then.

The Witness: What was your question?

Mr. Penney: Will you read the question, please?

(Testimony of Arthur Stanley Leitch)

(Question read by the reporter.)

A. I don't believe I could set an exact date on the time it happened, until I start associating things to set a time. My employees would probably be of more assistance in setting the time than I could be, offhand.

Q. By Mr. Penney: When did you tell Mr. Davis, when he asked you the question as to when it happened, when did you tell him you had taken these stones out?

A. I don't know as I told him a definite time.

Q. He asked you, didn't he?

A. He probably did.

Q. And you told him you couldn't tell him? [84]

A. I think so.

Q. Did he ask you to describe the rings?

A. Yes, he did.

Q. What did you tell him?

A. I told him I couldn't describe them. I knew there were many stones I had taken out, but I couldn't tell him the size or how many there were.

Q. Nor could you tell him the pieces at that time, could you?

A. No, I don't know as I could, the exact pieces. There were many pieces.

Q. Did you tell him you could tell him at that time whether or not they were diamonds or any other kind of stones?

A. I don't think I told him that, no.

Q. Can you recall anything else that he asked you in that conversation?

A. Yes. They asked me the identity of all the pieces of jewelry, and I told them I didn't know exactly the identity of all of them, because I hadn't paid any particular attention.

(Testimony of Arthur Stanley Leitch)

Q. They gave you then the description of the pieces of jewelry? A. A description, yes.

Q. And Mr. Davis or the gentleman with him asked you if that would refresh your recollection, to go over the [85] description? A. That is right.

Q. And you did that? A. I did.

Q. And that refreshed your recollection?

A. Yes.

Q. How long was Mr. Davis and this other gentleman down there with you?

A. Oh, a couple or three hours, probably.

Q. Were you discussing this matter the entire time?

A. Well, they weren't discussing it with me the entire time. They talked to Mr. Jones and Mrs. Jones and another employee in my laboratory at the time.

Q. So your testimony about the time that Mr. Williams came down there had been refreshed by the recollection of other witnesses; isn't that a fact?

A. Yes, refreshed a lot.

Q. Did you see Mrs. Williams at that time?

A. Yes.

Q. Did she come up there with these gentlemen?

A. She came up before the gentlemen came up.

Q. In person? A. Yes.

Q. Did she tell you why these gentlemen were coming up to see you?

A. Yes. She said they wanted some information about [86] the jewels.

Q. Is that all she said?

A. That is all she had to say.

Q. Just came up and made that one statement and left? A. She didn't leave. She stayed there.

(Testimony of Arthur Stanley Leitch)

Q. Was she there when Mr. Davis and this other gentleman came up? A. Yes.

Q. Did she remain there the entire afternoon?

A. They weren't there the entire afternoon.

Q. They were there some three hours? A. Yes.

Q. And she remained? A. Yes.

Q. Did she participate in the conversation?

A. Some.

Q. What specifically did she say?

Mr. Davis: I will object to that as not proper cross examination, what she said.

Mr. Penney: I would like to have the entire conversation.

The Court: I think so.

Q. By Mr. Penney: What, if anything, did she tell you?

A. We talked about the occasion of when she came down and the jewels she brought, and the ones she wanted me to take the stones out of and, of course, it all refreshed my [87] mind. There was no occasion for me to remember it.

Q. She also told you at that time, did she not, that these came out of a fake hold-up?

A. No, she did not.

Q. What, if anything, did these gentlemen say about it?

A. They didn't even tell me what they were getting the information for. I said I would like to know, but I figured that it was their business.

Q. You weren't curious enough for that?

A. Sure, I was curious, but I didn't ask.

(Testimony of Arthur Stanley Leitch)

Q. You stated that you didn't know anything at all about the subject matter of this lawsuit in court today?

A. That is right. I had my own idea, but I didn't have any information on it.

Q. Had you seen Mrs. Williams from the time Mr. Davis came down there in 1942 until today?

A. No. I didn't hear from her during that period until about a few days ago.

Q. She called you at that time? A. Yes.

Q. And you proceeded to come in today?

A. Yes.

Q. Did Mrs. Williams tell you over the telephone what she wanted you up here for?

A. She said the case was coming up in court, and she would like to have me describe the jewels and tell about them [88] again.

Q. And is that all that was said over the telephone?

A. She told me Mr. Davis would call me, and would I come up, and I said I would rather not have to come, the way business was, but if I had to I would.

Q. Had you seen Mr. Davis from 1942 until the time you came to court today? A. No, sir.

Q. Had you see Mr. Bledsoe?

A. I never met Mr. Bledsoe before.

Q. Did you see the gentleman that came down in 1942 with Mr. Davis after that occasion? A. No, sir.

Q. And the only conversation you had with Mrs. Williams was over the telephone? A. Yes, sir.

Mr. Penney: That is all.

(Testimony of Arthur Stanley Leitch)

Redirect Examination

Q. By Mr. Davis: Mr. Leitch, directing your attention to the occasion when Mr. McAnally and I came there— Let me ask you: From your laboratory, did you not, in company with Mrs. Williams, myself and Mr. McAnally, the investigator, go down to the home of the two Joneses? A. Yes.

Mr. Penney: I object to this as leading and suggestive.

Mr. Davis: It is just refreshing his recollection on [89] that one point.

Mr. Penney: I object to it. He is going to lead his own witness.

The Court: Well, he has led him, and the answer is in.

Q. By Mr. Davis: Mr. Leitch, on that occasion was Mr. Lloyd interviewed in your presence by Mr. McAnally and myself? A. Yes.

Q. Mr. Leitch, referring to the question of whether or not you dismantled glass or precious stones, diamonds, did you apply any heat to any of the sets?

A. To the metal, not to the stones.

Q. Did you apply the heat after the stones were removed? A. Yes, to the ring.

Q. What is your best judgment as to the character of those stones you removed from these three mountings?

Mr. Penney: Just a moment. He is no expert, and I object.

Q. By Mr. Davis: If you know. I will withdraw the question. I just wanted to know whether he could tell the difference.

The Court: He testified on cross-examination that he cannot. [90]

LOLITA LEITCH JONES,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Mrs. Lolita Leitch Jones.

The Clerk: Where do you reside?

A. 2820 Thirtieth Street.

The Court: San Diego? A. Yes.

Direct Examination

Q. By Mr. Davis: Mrs. Jones, you are the sister of Mr. Leitch, who just testified? A. That is right.

Q. How long have you known Mrs. Williams?

A. Well, I wouldn't testify any particular date. It seems like I have known Betty all my life.

Q. All your life? A. Most of the time. [91]

Q. Where did you first get acquainted with her?

A. In San Diego, years ago.

Q. Did you go to school together? A. No.

Q. Have you seen much of her in recent years?

A. Very little.

Q. You lived together at one time? A. Yes.

Q. Do you recall when it was?

A. I should say it was approximately the beginning of—well, I wouldn't want to say. I have lived in Los Angeles, and it was about September, 1933, when I first went down to San Diego to live with my brother Arthur.

Q. And she roomed with you at that time?

A. It was during that time I met Betty through my big sister.

The Court: She came to San Diego about that time?

A. Sometime around that time. I wouldn't want to state, because there was no reason why I should remember that particular date.

(Testimony of Lolita Leitch Jones)

Q. By Mr. Davis: Directing your attention to a time in the late spring of 1940, do you recall seeing Betty Williams at that time?

Mr. Penney: To which I am going to object as leading and suggestive.

The Court: Objection overruled. In the late spring [92] of 1940?

A. I wouldn't want to say any particular date. There was no reason why I should remember the date. It was very shortly after I was married to Mr. Jones.

The Court: When was that? A. July 11, 1939.

Q. By Mr. Davis: I wasn't referring to any particular time, but did you have any particular occasion in mind, when I asked about 1940?

A. Yes, I had. It was a habit of mine at that time—my husband was working for my brother, and if I had nothing else to do I would walk up there from my home and visit in the afternoon with both of them, and on this particular afternoon I went up there and Betty was there.

Q. Do you know who else was there?

A. My husband and my brother, and Lieutenant James Keith, or Fred.

The Court: His name is different now?

A. At that time, through adoption, or I don't know exactly how it was, and it has been legally changed by the court since to "Frank." I knew him then as Jimmy Keith.

The Court: He wasn't a lieutenant then?

A. No; he was just a laboratory assistant.

Q. By Mr. Davis: And who else?

A. My husband, my brother and myself.

(Testimony of Lolita Leitch Jones)

Q. What, if anything, occurred there on that occasion [93] when Mrs. Williams was there, when you saw her?

A. I was glad to see her, for one thing, and I noticed that she had a handkerchief in her hand with some stones in it. The size of the stones or the values I have no idea of.

Q. Did you look at them?

A. Just a passing glance; but I didn't question her at all.

Q. Tell about the size—I don't mean in carats—but were they large stones or small stones or what were they? How would you describe them?

A. With a person holding a handkerchief like this, you don't intend to be too curious, and you really can't say the size.

The Court: Were they as big as marbles?

A. Well, hardly. They were small chip size. They weren't very large.

Q. By Mr. Davis: Were there any colored stones?

A. I don't know. If there was any in there I probably would have seen them. I didn't notice.

Q. Were there any stones larger than the others?

A. Yes.

Q. About how many? A. That I couldn't say.

Q. Did you hear Mrs. Williams say anything about Mr. Williams during that day?

A. I had never met Mr. Williams, but during the few [94] minutes I was there Mrs. Williams or Betty left the room to go downstairs to see Mr. Williams.

Q. Did she say she was going to see Mr. Williams?

A. Yes.

Q. Did she come back before you left?

A. Yes, just before I left.

(Testimony of Lolita Leitch Jones)

Q. Do you recall any particular incident regarding the time she came back?

A. No, I couldn't state.

The Court: Any incident when she came back?

A. She brought coca-colas. That is usually a habit of a person that goes downstairs, to bring coca-colas.

Q. By Mr. Davis: Did you hear Mr. Leitch or Mrs. Williams say anything about bringing Mr. Williams up?

A. No, I didn't.

Q. You didn't hear that? A. No.

The Court: Did she bring Mr. Williams up?

A. No, Mr. Williams didn't come up while I was there. I only stayed a few minutes.

Q. By Mr. Davis: Subsequent to that was this matter of breaking up the—the matter of having these diamonds ever brought to your attention?

Mr. Penney: I object to that question. She didn't testify to anything about that.

Mr. Davis: Loose stones—I will call them stones.

[95]

The Court: Do you know they were stones?

Q. By Mr. Davis: What would you call them, whatever she had in her hankerchief?

A. I would call them stones. I am not a jeweler.

Q. You wouldn't know whether they were diamonds or sapphires? A. No, I wouldn't.

* * * * *

Cross Examination.

Q. By Mr. Penney: Mrs. Jones, you have known Betty or Mrs. Williams for how many years?

A. I don't know how many years I have known Betty.

(Testimony of Lolita Leitch Jones)

Q. On this occasion when you met her in San Diego, how many years had it been prior to that time when you had seen her?

A. I couldn't say. I met Betty through my sister, who has known her for years; I don't know how long; I wouldn't want to commit myself. [96]

The Court: He asked how long prior to the time you saw her in the office that day you had seen her before.

A. I don't really recall.

The Court: You got married July 11, 1939. Had you seen her since you were married?

A. No, I hadn't seen Betty from the time I was married until the time I saw her at the laboratory.

Q. Prior to the time of your marriage how long had it been since you saw her?

A. Betty lived with us up until—well, in 1933 or 1934, and then I went to San Francisco and stayed there a couple of years, and then, of course, I hadn't seen Betty during—

Q. When you came down to San Diego, was Mr. Williams living with your brother and your other sister?

A. No, not at that time.

The Court: When you first went down there in 1933, or after you came back from San Francisco?

A. I don't recall if Betty, when I came down, if she was living with my brother and sister.

The Court: In 1933?

A. I don't recall. We had several of my sister's friends down off and on.

Q. By Mr. Penney: Then you went to San Francisco for a couple of years? A. Yes. [97]

Q. And then you came back? A. Yes.

(Testimony of Lolita Leitch Jones)

Q. Was Mrs Williams living in San Diego with your brother and sister at that time?

A. No, she wasn't.

Q. You were married in 1939?

A. That is right.

Q. When was the last time you had seen Mrs. Williams prior to the time of your marriage?

A. It was a matter of years.

Q. You had always been very friendly with her?

A. I am very fond of Betty.

Q. When you saw her on this occasion, which was shortly after your marriage, how long did you remain there with her? A. In the office?

Q. Yes.

A. I stayed there not more than 15 or 20 minutes, not any longer than that.

Q. The only thing you can recall about this whole transaction was the fact that she had some stones in her hankerchief?

A. I can describe every piece of apparel she had on.

Q. I don't doubt that.

The Court: What did she have on—I mean outside?

A. I have always loved clothes, and I remember she [98] had on a lovely black coat, and it was when wedgies first came into style, and she had on a pair of red wedgies, and they were raised across the toe, and that entranced me very much. I liked those very much.

Q. Did you see any jewelry on her?

A. No, I didn't notice.

Q. Did you notice?

A. No, I didn't; I didn't notice, to tell you the truth.

(Testimony of Lolita Leitch Jones)

Q. You were married in July of 1939?

A. That is right.

Q. And you say this was soon after your marriage?

A. It was six months or so.

Q. Sometime within six months after you were married? A. Yes. [99]

* * * * *

HUGH JAMES JONES,

called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Hugh James Jones.

The Clerk: And your address?

A. 2820 Thirtieth Street, San Diego.

Direct Examination.

Q. By Mr. Davis: You are the husband of the Mrs. Jones who just left the stand?

A. Yes, sir.

Q. You formerly worked for Mr. Leitch?

A. Yes.

Q. Where are you employed now?

A. Ryan Aeronautical Company, San Diego.

Q. How long have you been employed there?

A. A little better than four years. I first went to work at the Ryan Aeronautical Company October 31, 1940.

Q. And where were you working prior to the time you went to work for Ryan?

A. I was working for my brother-in-law in his dental laboratory in San Diego.

(Testimony of Hugh James Jones)

Q. Your brother-in-law, Mr. Leitch, who testified?

A. Yes.

Q. Do you know Mrs. Williams, Elizabeth Williams?

A. Yes, I do. [100]

Q. Do you recall the occasion of seeing Mrs. Williams in Mr. Leitch's laboratory?

A. Yes. She was there prior to my having left there on October 31st.

Q. Would you be able to fix the approximate date you saw her there?

A. As I best remember it, it was two or three months prior to the time I left, probably around May, the latter part of May, or June, sometime around in there.

Q. Will you just relate what you observed there on this occasion?

A. Well, on that particular day—

The Court: Is this merely cumulative?

Mr. Davis: Yes, your Honor, although he remembers a little more detail.

The Court: All right.

A. I think I had been downstairs buying some supplies, swabs and powders, that we use for cleaning dentures, materials of that type, and I don't just recall what it was; but when I came upstairs Betty was there.

Q. By Mr. Davis: You had known Betty before?

A. Yes, I had known Betty before.

Q. Did you see Mr. Leitch dismounting or breaking up any jewelry? A. Yes.

Q. Did you examine the jewelry? [101]

A. No, I didn't pay any particular attention to it at first, because I thought it was merely some piece that was broken, and I saw that he was cutting them up, and

(Testimony of Hugh James Jones)

then there was one that—I don't recall especially—well, anyway, it goes around the wrist. I imagine you call it a bracelet. He was trying to get the stones out with a pair of side cutting pliers.

Q. You saw that? A. Yes.

Q. Did you examine the jewels closely?

A. No, I didn't examine them too closely. There was one that I examined after the jewel was out, the stone. It was a ring that was extremely hard, and I know we had a hard time cutting the metal in a lathe.

Q. Do you know the difference between glass and diamonds?

A. No; I am not a jeweler, and I don't.

Q. Did you hear any remarks made there at the time regarding Mr. Williams?

A. As I best recall, I think Mrs. Williams said she was going downstairs to see him, and then she came back up, and then later, if I recall correctly, she said she would like to have Art come down.

Q. Did you see what happened to these articles after Mr. Leitch had removed the stones?

A. Yes. She wrapped them up in a hankerchief or piece [102] of paper and carried them out with her.

Mr. Davis: I think that is all. You may cross-examine.

Cross Examination.

Q. By Mr. Penney: Mr. Jones, how long were you there that afternoon?

A. I was there all afternoon.

Q. Did your wife come up there that afternoon?

A. Oh, yes.

(Testimony of Hugh James Jones)

Q. When did she come up?

A. My wife was up there—I think she was up there before Betty came in. I am not sure.

Q. Did you leave with your wife that evening?

A. No. She went home before I did.

Q. Did you do anything at all in cutting up this jewelry?

A. No, sir. I was busy working.

Q. You stated a moment ago that "We had a hard time" with one of these pieces.

A. He had a hard time cutting it up, because of the hardness of the metal.

Q. But you had nothing at all to do with it?

A. No.

The Court: I understood that you testified that you tried to cut this ring.

A. We tried to melt it up.

The Court: You tried to melt it? [103]

A. Yes. I held the torch on it, the blow torch.

Q. By Mr. Penney: Do you know anything about the melting of silver? A. No, I don't.

Q. Is that a hard metal?

A. That is a soft metal.

Q. How about gold? Is that a hard metal?

A. Gold is a soft metal.

Q. How about platinum?

A. Platinum is a soft metal, I guess. I don't know.

Q. Platinum, gold and silver are soft metals?

A. I would imagine they are.

The Court: What is a hard metal?

A. I would say stainless steel. That is what I am working with now.

(Testimony of Hugh James Jones)

Q. By Mr. Penney: Could you melt this one ring?

A. No, it wouldn't melt. [104]

* * * * *

Mr. Penney: Will you take the stand, please, Mrs. Williams?

The Court: Is this cross-examination of the plaintiff's cross-examination, or are you calling this witness under the provisions of 43 (b)?

Mr. Penney: This is cross-examination on her cross-examination.

The Court: You then expect to be bound by her answers?

Mr. Penney: No, your Honor, we do not expect to be bound by her answers. It is cross-examination of the cross-examination. I certainly want to call her under 43 (b). She is an adverse party.

Mr. Davis: She is an adverse witness, but not an adverse party, and he may cross-examine on matters gone into by us only.

The Court: Section 43 (b) states, "and may be cross-examined by the adverse party only upon the subject matter of his examination in chief." That is cross-examination.

Mr. Penney: I think the court can appreciate my [105] position, as far as I am concerned. I want to have the opportunity of cross-examining this witness, and I certainly do not want to call her as my own witness.

The Court: I think under Rule 43 (b) you can certainly call her and cross-examine her on any issue that is material to the case, whether touched by the plaintiff's

cross-examination of her or not. I think it is equally clear that if you choose to cross-examine her now you are limited strictly and solely to the matters that were touched upon by the cross-examination by the plaintiff. I think if you proceed to cross-examine her now, that, in the event a motion to dismiss is made or a motion for non-suit, at the conclusion of the plaintiff's case—I am not indicating that one should be made or granted—but taking that into consideration, in the event you do make such a motion and cross-examine her now, I will be bound to take her testimony on this cross-examination of her by you into consideration and give it effect in favor of the plaintiff and against you, on a motion for non-suit.

Mr. Penney: Your Honor, I shall confine myself at this time solely to cross-examination on the matters that have been gone into by Mr. Davis.

The Court: Did I make myself clear on the latter matter?

Mr. Penney: Yes, your Honor.

The Court: Then on a motion for non-suit anything you [106] develop to your injury—in other words, if, at the conclusion of the cross-examination by you the plaintiff rests, and you make a motion for non-suit, I will then be compelled, under the rule, to give all inferences to her testimony against you and all presumptions against you and in favor of the plaintiff.

Mr. Penney: That is right.

The Court: All right. That is the only difference I see really between cross-examination on a cross-examination and a cross-examination under 43 (b).

Mr. Penney: I shall go into the things that have been testified to.

The Court: Very well. [107]

(Testimony of Hugh James Jones)

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A. No, it wouldn't melt. [104]

* * * * *

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Mr. Penney: I shall go into the things that have been testified to.

The Court: Very well. [107]

ELIZABETH J. WILLIAMS,
a witness heretofore duly sworn on behalf of the plaintiff,
upon being recalled, testified as follows:

Cross Examination.

Q. By Mr. Penney: Mrs. Williams, when were you married to Mr. Williams? A. June 3, 1939.

Q. And a divorce action was brought against you by Mr. Williams in 1940, was it not? A. Yes, sir.

Q. And you testified under oath in the Superior Court of the County of Los Angeles in that case, did you not?

A. Yes, sir.

Q. And did you not at that time, while under oath, state, in substance or effect, that there was a robbery which occurred in Calexico on the 31st day of December, 1939, in which certain diamonds were taken from you and from Mr. Williams?

A. I said there was, and I—

Mr. Penney: Never mind. That is all. [108]

* * * * *

Redirect Examination.

Q. By Mr. Davis: Do you recall what question was asked you in the divorce proceeding regarding this robbery?

The Court: Do you recall the identical question?

A. No.

Q. By Mr. Davis: Do you recall the substance of the question as asked you? A. It wasn't—

Mr. Penney: Answer that yes or no.

The Witness: The question again, please.

Q. By Mr. Davis: Do you recall the substance of any question that was asked you regarding the alleged robbery, when you were testifying in the divorce proceeding?

A. No, I don't remember it.

(Testimony of Elizabeth J. Williams)

Q. You don't remember the exact words?

A. No.

Q. Do you recall what you said? A. No.

Q. Now wait. Do you recall what you said, either in substance or exactly? A. No.

Q. In the divorce proceeding, regarding the robbery in Calexico? [110]

A. I don't remember.

Q. Why did you just now tell us that you did answer that there had been a robbery in Calexico?

Mr. Penney: I object as to why she did it.

Mr. Davis: She does not recall either what question was asked or what answer she gave. Why did you—

The Witness: Why did I say I did?

Mr. Penney: Just a moment.

The Court: Your objection is that it is not proper cross-examination?

Mr. Penney: I object on the ground that it is immaterial why she answered that question, as long as it has been answered. She testified that that was the way she testified under oath.

The Court: I think it is probably immaterial. I will let her answer, unless you have some particular showing to make as to why she testified.

Mr. Davis: Why does she say now that she so testified?

The Court: That is argument.

Q. By Mr. Davis: Let me ask you this question: Isn't it a fact, Mrs. Williams, that the question of whether or not there had been a bona fide robbery in Calexico in 1939, in December, 1939, was never asked or gone into in the divorce proceeding?

SYDNEY M. WILLIAMS,

called by the plaintiff as a witness under the provisions of Section 43 (b) of the Rules of Civil Procedure, being first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. Sydney M. Williams.

The Clerk: And your address?

A. Republic Studios, Studio City.

Direct Examination.

Q. By Mr. Davis: You are one of the defendants in this case, Mr. Williams? A. Yes, sir.

Q. Mr. Williams, referring to the first policy here, covering specifically on jewelry, did you have an appraisal made?

A. I did. I first brought it up to Mr. Horowitz's office. [118]

Q. Who is Mr. Horowitz?

A. That is the insurance broker. Because I was under the impression that he would have it appraised. One of the reasons—

Q. Just a minute. You did have it appraised?

A. Yes, sir.

Q. Who appraised it? A. Mr. Lippert.

Q. At the time it was appraised, did you present it to him? A. Yes, sir.

Q. Where? A. In his office.

Q. Where was his office?

A. To the best of my recollection, it was some place on Fifth Street, or one of those jeweler's places, I think—the Metropolitan—I am not positive.

Q. Did you make any report of this robbery?

A. Yes.

(Testimony of Sydney M. Williams)

Q. Who did you report to first?

A. Mr. Horowitz, our agent. Mrs. Williams and myself went over there and told him what had happened.

Q. And what did he tell you to do?

A. He took us over to the adjuster, Toplis & Harding, and introduced us to Bob Reynolds, and Mrs. Williams and myself told Bob Reynolds the story at your office.

Q. The office of the Continental Insurance Company?

[119]

A. That is right. Toplis & Harding is the adjuster.

Q. Who did you see at Toplis & Harding?

A. Bob Reynolds.

Q. Did you see him personally? He is sitting there (indicating). A. Yes.

Q. Is that the man you talked to? A. Yes.

Q. Did you discuss this case with anybody else?

A. At Toplis & Harding?

Q. At Toplis & Harding.

A. No. Later Mr. Lewbel went up there with us.

Q. At the time you went up and reported this matter to Toplis & Harding and Mr. Reynolds, what did you tell him?

A. I told him we had been held up in Calexico, and gave him all the facts.

Q. Tell us briefly what you told him.

A. I told him we had gone to Calexico upon the invitation of Mr. and Mrs. Brown, and had gone down there on the 30th, and had spent the day with the Browns, and the next day Mr. and Mrs. Brown had invited us to a party at some Mexican official's home, and we had gone to the hotel to dress, and, after dressing, we were going over to the Browns' house, which is about two and a half

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Q. The office of the Continental Insurance Company?
[119]

A. That is right. Toplis & Harding is the adjuster.

Q. Who did you see at Toplis & Harding?

A. Bob Reynolds.

Q. Did you see him personally? He is sitting there (indicating). A. Yes.

Q. Is that the man you talked to? A. Yes.

Q. Did you discuss this case with anybody else?

A. At Toplis & Harding?

Q. At Toplis & Harding.

A. No. Later Mr. Lewbel went up there with us.

Q. At the time you went up and reported this matter to Toplis & Harding and Mr. Reynolds, what did you tell him?

A. I told him we had been held up in Calexico, and gave him all the facts.

Q. Tell us briefly what you told him.

A. I told him we had gone to Calexico upon the invitation of Mr. and Mrs. Brown, and had gone down there on the 30th, and had spent the day with the Browns, and the next day Mr. and Mrs. Brown had invited us to a party at some Mexican official's home, and we had gone to the hotel to dress, and, after dressing, we were going over to the Browns' house, which is about two and a half

(Testimony of Sydney M. Williams)

blocks from the hotel, and we were walking over to the Browns, and when we got about a block or a block and a half back of the hotel, [120] Betty and I were walking down the street, and I heard a voice in back of me say, "Hey Mister," and we turned around, and there were two men there. One was an American and had a full face, and the other chap was a Mexican, and he had a gun in his hand, and the American had his hand in his pocket. Whether there was a gun in it or not I don't know. He had his hand out like this. And the Mexican said, "Don't get excited. Nobody is going to get hurt. All we want is your money and jewelry." And immediately Betty said, "Don't argue with them, Honey; give them anything they want." And we started taking off our jewelry and watches. And I took off my ring and handed it to the man, and he said, "Give me your watch." And I took off my watch and gave it to him. And he said, "Now, I want your money," and I took out my wallet and took the bills out and handed it to him, and he looked at the bills and said, "Is that all you have got?" And I said, "Look for yourself," and he said, "All right. Don't turn around or move for five minutes. If you do, I will come back and get you." And about thirty seconds or a minute after that I heard this car start away fast, and it sounded to me like a Chevrolet. And I said, "Come on, Honey; let's go." And we ran all the way to the Browns, about a block and a half, and ran up to the door, and Lois came to the door, and we told her what had happened, and said, "Come on; let's go to the police station." And we got in the car and went to the police station, and we made a report to the [121] police there, and he got on the phone and called Calexico, called the sheriff's office, and put out a dragnet for them.

(Testimony of Sydney M. Williams)

Q. That is what you told Mr. Reynolds?

A. Yes. We told him the whole story. Then—I don't know—I will be glad to go on and tell you what happened after that. I don't remember whether I told Bob Reynolds what happened after that. The next day the Browns and myself went back to the police station, and they told us then that two men were operating in the vicinity and they hadn't been able to apprehend them yet. Then after that they picked up some suspects.

Q. That is what you told Mr. Reynolds?

A. Whether I told him what happened after that I have no recollection exactly.

Q. Did you tell Mr. Reynolds what you had lost?

A. Yes, I did.

Q. What did you tell him you had lost?

A. My diamond ring and my wrist watch, and \$96 in money, and Betty's diamond wrist watch and her diamond and emerald bracelet, and her ring she wore on her little finger, and a big diamond.

Q. Did you tell him what the diamond watch and bracelet attachment containing 84 diamonds and two baguettes had cost?

A. There was no discussion of that at all. He had the appraisal that was made, the appraisal at the time they [122] took it, and I would like to explain that appraisal, if I may.

Q. Very well.

A. At the time of the appraisal, when I took the diamonds to Mr. Lippert, a diamond importer, he asked me if I wanted the jewelry appraised at cost, at importer's price, wholesale price, or retail price, and he explained that under the policy I could have them insured for either one.

(Testimony of Sydney M. Williams)

Q. Who made that explanation?

A. Mr. Lippert. Mr. Horowitz told me to get an outside man to appraise it, that the company would not appraise it, but your man had looked at it.

Q. You say my man?

A. The Continental—I am sorry, Mr. Davis. I don't know the Continental Insurance executive who did it.

The Court: Were you present when the appraisals were submitted?

A. Yes, I was. He looked at them very thoroughly, and made the remark that they were the most beautiful diamonds he had ever seen.

Mr. Davis: I move to strike that.

The Court: It may be stricken.

The Witness: May I go on about the appraisal, sir?

The Court: I think he will ask you the questions.

Q. By Mr. Davis: You mentioned Mr. Lippert, you got Mr. Lippert to appraise the jewelry. Did he give you a [123] written appraisal of it?

A. Yes, he did, at import prices.

Q. When did you get the appraisal from Mr. Lippert, as to the date of the policy?

A. Mr. Davis, I couldn't tell you that. It was right around the date of the policy, and they had to have the appraisal before they wrote the policy.

Q. Isn't it a fact that the policy was written subject to the appraisal, and the appraisal came later?

A. I don't know that.

Q. You say you didn't tell Mr. Reynolds anything about where you got this jewelry or what it cost?

A. No, I did not.

(Testimony of Sydney M. Williams)

Q. None of the items?

A. He didn't ask me.

Q. Didn't he ask you what you paid for the one platinum diamond engagement ring, center stone weighing approximately 3 carat, also containing 8 baguettes and 22 round diamonds, and didn't you answer him that you paid \$3,000 for that ring? A. No, sir.

Q. That is not a fact?

A. No, sir. As a matter of fact, I paid more than that for it.

Q. What is that?

A. I say, as a matter of fact, I paid more than that [124] for it.

Mr. Davis: I move to strike that last answer.

The Court: It may be stricken.

Q. By Mr. Davis: You understood my question? I asked you what you told Mr. Reynolds.

A. I have already answered it. I told you I did not tell him.

Q. Isn't it a fact that he asked you what you paid for the gent's diamond ring measuring scant 2 carat center, and you told him you paid \$375 for it?

A. No, sir.

Q. May I ask you what you did pay for that ring?

Mr. Penney: Your Honor, I am going to object to this examination, because they have paid the loss, according to their own statement, and I think they are precluded now.

The Court: It is a suit for fraud.

Mr. Penney: I realize that, your Honor.

The Court: Overruled.

(Testimony of Sydney M. Williams)

Q. By Mr. Davis: Let me ask you what you did pay for the one gent's diamond ring measuring scant 2 carat center.

A. I didn't pay anything for it in money, sir. I received it as a fee in a Wright Act case in 1928. I had it appraised by Mr. Laykin.

The Court: What item is that?

Mr. Davis: Item No. 6 on the schedule, your Honor.

The Court: What was the other item you were talking [125] about?

Mr. Davis: The other item was Item No. 5.

The Court: What was this question—what he told Mr. Reynolds, or what he paid for it?

Mr. Davis: What he actually paid for it.

A. That was for a Wright Act case in about 1928.

Q. By Mr. Davis: And you had that ring from 1928 to the date of this alleged robbery? A. Yes, sir.

Q. What did you pay for the platinum diamond watch with diamond bracelet attachment containing 84 diamonds and 2 baguettes?

The Court: What is that item?

Mr. Davis: Item No. 1, your Honor.

The Court: In Exhibit No. 1?

Mr. Davis: Yes, your Honor.

A. That I acquired at the same time as I acquired the— You are asking me about what?

Q. Item No. 1. A. The watch?

Q. Yes.

A. I acquired the watch at the same time I acquired the platinum diamond engagement ring listed as No. 5, in 1936, from one Max Rosenthal, who was a client of mine and was a diamond importer.

(Testimony of Sydney M. Williams)

Q. What did you pay him for that watch? [126]

The Court: Just a moment. I notice you called that No. 5. A. I have the list here.

The Court: I am a little confused on that. What was it you said you paid nothing for—item 6?

A. For item 6, I got that as a fee.

The Court: 1 gent's diamond ring measuring scant 2 carat center?

A. I paid nothing for that.

The Court: On No. 5, what was the—

A. No. 5 and No. 1 were acquired at the same time.

Q. By Mr. Davis: From Max Rosenthal?

A. From Max Rosenthal.

The Court: By purchase?

A. Yes and no, your Honor. I would like to explain it.

Q. By Mr. Davis: Very well.

A. I was Max's attorney in some very hotly contested divorce litigation, wherein his wife had tied up some of his funds and his diamonds and jewelry in our Superior Court. I was his attorney for several years without compensation and had loaned Max money to live on, because he didn't have the funds to live on. His money was tied up. And after the conclusion of the divorce case, when his property was divided up, he had these items, and he wanted me to cancel his obligation to me for the moneys I had loaned him and for [127] my legal services, and also wanted additional cash; he wanted \$1500 from me, and I offered him \$900 and the cancellation of the debt. I took the property over to Mr. Laykin, and he appraised the ring as worth \$2500 at retail, and the watch as worth retail \$750, and it seemed like an excellent deal to me, and

(Testimony of Sydney M. Williams)

I made the deal with him, cancelled what he owed me by way of my attorney's fees, and gave him \$900, and took the watch and the ring.

Q. By Mr. Davis: Referring to the platinum diamond wedding ring, you purchased that—that is item No. 2, platinum diamond wedding ring with 11 diamonds. I will withdraw that question. 1 diamond friendship ring, large center with 14 smaller round stones set in platinum. That is item No. 3. Did you purchase that?

A. Yes, I did.

Q. Where did you purchase that?

A. I purchased that from David Riskin.

Q. When?

A. Some time before we were married. I bought that for Betty as an engagement ring. I took her up to Mr. Riskin and bought it through Mr. Riskin. However, Mr. Riskin was acting as a broker, as I understood at the time, for some woman.

Q. You paid the money to him?

A. I paid \$500 for the ring. It was a check that was introduced in evidence. [128]

Q. The check that was introduced in evidence is the check that you paid for this ring?

A. For item No. 3 on this list.

Q. One diamond friendship ring?

A. That is right. It is item No. 3 on our list.

The Court: \$250?

A. No. That is a ring that has nothing to do with this. It was a \$500 check.

The Court: A \$500 check and \$250?

A. I paid Mr. Riskin \$500 for the ring.

(Testimony of Sydney M. Williams)

Q. By Mr. Davis: 1 diamond and emerald bracelet, item No. 4, set in platinum, with 1 Marquise center and 74 fullcut diamonds, weighing approximately 5 carat. Where did you get that?

A. I got that through Mr. Lippert. That also was not his bracelet. He was acting as a broker, as I understood it.

Q. When did you get that?

A. I can't remember the date. You have one of the checks here, or you have the date of it.

Q. Approximately when?

A. That cost eight hundred and something. That was paid in two checks, one \$500 check and the other three hundred and something, and I had that appraised also. Mr. Lippert allowed me to take that to Laykin's, and Mr. Laykin appraised that diamond bracelet as worth \$1500 retail. [129]

Q. You say he was selling it for somebody else?

A. Yes.

Q. And was that transaction made at the same time that this other transaction was?

A. What other transaction?

Q. The one you just testified about.

A. I am sorry. I don't know what you mean.

Q. Was that transaction made about the same time as the time you bought the diamond friendship ring?

A. No. I think it was some time after that. It was at Hutton's. I was trading at Hutton & Company, and Mr. Lippert was trading at Hutton & Company, and he told me about this woman that needed money, and at that time the stock market was going down, and she was caught in the stock market, and she needed money.

(Testimony of Sydney M. Williams)

Q. And he told you about this? A. Yes.

Q. Did he introduce you to the woman?

A. I have never seen the woman.

Q. Where did you first see this item?

A. I asked him if he would let me take it out and get it appraised, and he said, "Certainly," and he brought it down to Hutton's, and Laykin's is right across Pershing Square from where I was trading at Hutton's, and I walked over to Laykin & Company, and he appraised it as worth \$1500 retail. [130]

Q. He appraised it at \$1500?

A. That is the retail price, yes.

Q. And you then bought it and gave him a check?

A. I gave him two checks, one for \$500,—she needed money right away—and a day or two later I gave him a check for \$355 or \$385—I don't know which. That is the jewelry that is listed here as No. 4, \$900. One of those checks Mrs. Williams has, and the other was introduced in the divorce trial. I introduced it there.

Q. You introduced a check payable to Lippert in the divorce trial? A. Yes.

Q. And if I asked you if you didn't make this on or about the second day of June, 1939, would that refresh your memory?

A. If you say that is the date, that is it. I don't remember. I don't remember the date.

Q. And Mr. Lippert was selling somebody else's property to you? A. Yes.

Q. How far apart were these checks given?

A. Two days, I think.

Q. And do you have the record of the checks drawn?

A. No.

(Testimony of Sydney M. Williams)

Q. You say you gave Mr. Lippert two checks within two days, two days apart? [131]

A. Yes. We can probably get the records from the bank. The bank would have duplicate records of my statements.

Q. Did you buy any other property from Mr. Lippert about that time?

A. Not to my best recollection. I heard Mrs. Williams testify that I bought this diamond bracelet from him, and the diamond wedding ring, for \$90, but I don't have any recollection of that.

Q. Did you buy anything else, that you recall, jewelry that you bought?

A. As I told you at the time of the deposition, I don't remember buying her a diamond bracelet attachment for that watch, because when I bought the watch for \$55 it just had a black band on it, and that watch has nothing to do with this, with what you people are—

Q. You saw this check for \$90?

A. Yes, I did, and what it was for, whether—I was cashing checks for Lippert and he was cashing checks for me, and we were making bets, and it could have been for any one of a dozen things; I don't know what it was. We were on the stock market, and I really don't remember what it was.

Q. To the best of your recollection, did you buy any other jewels?

A. I bought that diamond wedding ring from either Riskin or Lippert. [132]

Q. I am asking you which—

A. I can't tell you something I don't remember, sir.

(Testimony of Sydney M. Williams)

Q. You don't remember about buying this diamond bracelet for the wrist watch?

A. No, sir. I know Betty wanted me to buy her a diamond band for that watch.

Q. Did you buy any jewels from either of these two men, Riskin or Lippert, other than those that you have just testified to?

The Witness: Would you read that to me, please?

Q. Did you buy any jewelry from Lippert or Riskin other than the jewels that you have just testified to purchasing?

A. I bought that wedding ring from one of them.

Q. How much did you pay for the wedding ring?

A. I couldn't even remember that. It wasn't a large sum. It was a diamond wedding band.

Q. At the time you were dealing with Lippert did he have a store?

A. No. To the best of my knowledge, Mr. Lippert was what was called a diamond importer, sold wholesale.

Q. He had a store there?

A. I don't believe he did have.

Q. Where was he working from?

A. In one of those—to the best of my knowledge, it was the Metropolitan Building. That is a jeweler's [133] building.

Q. Did he have a place of business?

A. Yes, sir.

Q. What was it—an office?

A. It was like all those diamond importers have, an office.

Q. But no store?

A. I don't think so.

(Testimony of Sydney M. Williams)

Q. And did Riskin have a storeroom, a store?

A. No. He also had an office in Loew's State Building.

Q. And that is where you transacted your business with him, at that office in Loew's State Building?

A. Yes, sir.

Q. Do you remember, out of this check you paid for this—

A. Just a minute. There was a question about the diamonds at that time. Mrs. Williams testified that when she married me she had fistfuls of loose diamonds and that all these diamonds were hers, and Mrs. Williams had taken all of my checks out of my files, and she was ordered to return them by the court, and she has never returned them. There were other diamonds involved that the court gave an order for her to return. We were trying to straighten out our property, and Mrs. Williams admitted this in court.

Q. Was that check introduced in court by you or by her? [134] A. By her.

Q. And this is the only check you introduced?

A. It is the only one I had. She has all of the rest of them. She has all my bank records.

Q. You didn't get any from the bank at all?

A. She has every one of my records, always has had them, has never returned them.

Q. There was a check to Riskin introduced in evidence, you say, over there?

A. That could be possible.

Q. That is the check you are talking about here?

A. Yes, that is the check in payment of this item
No. 3.

(Testimony of Sydney M. Williams)

The Court: How much was that check for?

A. \$500.

Q. By Mr. Davis: Mr. Williams, at the time you applied for the policy of insurance, did either you or Mrs. Williams have any other jewels other than those mentioned? A. Yes, sir.

Q. What did you have? A. I had the ring.

Q. Just what ring?

A. That the \$250 check was introduced for, that I bought from Mickey.

Q. What other jewels?

A. I had a diamond pin that I had gotten also as a fee [135] on a case. It was a tremendous thing, solid platinum two inches high, and on each one of the antlers it had a big diamond. And Betty had the wrist watch that I had gotten her in 1937, that I had bought from Laykin & Company.

The Court: That is listed as No. 1, isn't it?

A. No. That has nothing to do with this watch at all.

The Court: She had two wrist watches?

A. That is right. She had one that I got her in 1937. She didn't ever wear this until after we were married, and the \$55 watch was bought a year and a half or two years before I married her. She had that wrist watch.

The Court: That is No. 3, \$55?

A. That was for that watch that I bought her in 1937. That has nothing to do with anything on this schedule.

The Court: What kind of a watch was it?

A. A little square watch, with diamonds around it, a little Swiss watch. I looked at it yesterday. It could be this one, your Honor.

(Testimony of Sydney M. Williams)

The Court: It could be this watch?

A. It could be. I won't say definitely, because all those watches look alike.

The Court: This could be the watch, then, that you paid \$55 for, but that is not item No. 1?

A. No, your Honor. Item No. 1 is an entirely different shaped watch, an entirely different watch.

Q. That is not item No. 1? [136]

A. No, sir, definitely not.

Q. By Mr. Davis: Let me ask you, Mr. Williams, first of all—I want to get straightened out.

A. May I finish? I would like to finish my answer.

Q. Just a minute. The Elk's pin, and the ring you got from Laykin— A. Yes, sir.

Q. What kind of a ring was that?

A. That ring was a diamond ring. Mickey was getting married and wanted to buy some furniture, and he asked me \$250 for it and I took that down and—

Q. Just describe the ring.

A. It was a diamond ring, about a carat.

Q. And the Elk's pin?

A. A perfectly white stone.

Q. And then Betty had a wrist watch?

A. Betty had a wrist watch, and Betty had the ring and the pin.

Q. I am asking you, at the time the policy was taken out you say you had the jewelry that is specified in the policy? A. Yes, sir.

Q. And specified in this exhibit here?

A. Yes; and, in addition, we had these things.

(Testimony of Sydney M. Williams)

Q. Then you had the Elk's pin and the approximately one carat stone you got from Mickey? [137]

A. That is right. And Betty had the wrist watch.

Q. And that wrist watch had no diamond band?

A. If I bought her that—

Q. I am just asking you if it did.

A. It could have and it couldn't have, as I told you.

Q. I am just asking you one question, if, at the time the policy was taken out, Betty had a wrist watch with a diamond band.

A. I couldn't tell you that. She was asking me to buy a band for that watch long before that.

The Court: She did have a watch?

A. Yes, she very definitely did.

The Court: It was a square watch?

A. Yes; that is right.

Q. By Mr. Davis: And you say you don't remember whether you bought a band for it or not?

A. No, I don't.

Q. Then there was the Elks pin and the gent's ring, and the wrist watch. What other jewelry did you have?

A. Betty had a cigarette case with diamond initials on it.

Q. Any other jewelry? A. No.

Q. In the divorce case you made demand for her to produce certain jewels.

The Court: Was that all? [138]

A. Yes, sir.

The Court: That is all the jewelry you had which was not included in the policy? A. Yes, sir.

The Court: At what did they appraise that Elks pin?

A. Well, not the Elks pin—

(Testimony of Sydney M. Williams)

The Court: What did they appraise the carat stone for?

A. I can give you Mr. Laykin's exact words. He said, "If you want to drop it on the counter, I will give you \$400 for it right now," and that was good enough for me.

The Court: And the wrist watch you paid \$55 for?

A. I bought three different watches at different times.

Q. By Mr. Davis: In the divorce case you made the claim that she held certain jewelry belonging to you?

A. Yes, sir.

Q. What jewelry? You got an order from the court—

A. She admitted that she had taken them out of the box.

Mr. Davis: I move to strike that.

Q. What jewels was she ordered to return, by the court?

A. The Elks pin, and the ring I bought from Mickey.

Q. Was that by a minute order of the court?

A. Yes, that was a court order.

Q. Those were the only pieces she was ordered to return? A. That is right.

Q. And those were the only pieces that were ever in [139] controversy in the divorce action?

A. That is right. When she didn't return them—she didn't return a lot of other things, and I had to sue her in claim and delivery, and I got a \$6,000 judgment against her.

Mr. Davis: I move to strike that, your Honor.

The Court : It may be stricken.

Q. By Mr. Davis: Were those the only pieces of jewelry involved? A. Yes, sir.

(Testimony of Sydney M. Williams)

The Court: How many divorce suits were there?

A. There was one, but it took two years.

Q. By Mr. Davis: There were no loose stones?

A. Yes, there was. Betty testified that when she married me and when she first met me—

Q. I didn't ask about those things. I asked if there were loose stones involved in the claim in the divorce case.

A. No, sir.

The Court: What is a baguette?

The Witness: We have a couple of experts in court here. I would say it was a pear-shaped diamond. He is shaking his head there.

Mr. Davis: I was under the impression that it was a square-shaped diamond, but I don't know, either.

Mr. Bledsoe: It is those oblong slivers, those little [140] things at the end of it, that I have had described to me as baguettes, oblong-shaped.

Mr. Davis: I don't know how you can describe it.

Q. By Mr. Davis: Will you describe this watch you bought from Laykin in 1937?

A. Just a square little Swiss watch, with diamonds around it.

Q. And you paid \$55 for it? A. Yes.

Q. Was it similar to this watch?

A. I would say yes, Mr. Davis. I wouldn't say that was the watch. This looks like better than a \$55 watch to me, but I am not an expert. Probably one of the boys could tell you.

Q. You bought the watch?

A. Yes. I can't read what it says on here. Mine was a Swiss watch. The watch involved here was an entirely different shape, Mr. Davis.

(Testimony of Sydney M. Williams)

Q. I am asking you about the watch you bought from Laykin in 1937 and paid \$55 for. Is that the watch?

A. I have answered that twice. I don't know.

Q. You don't know whether it is or not?

A. That is right.

The Court: He says he doesn't know that that is the watch. You mean you don't know, because you can't read the name on the watch? [141]

A. No. I know it was a Swiss watch I got from Laykin, and it has a name on here. It looks like it might be "Elgin". I could tell if I could read it. The watch I bought in 1937 was definitely a Swiss watch. If it is an American watch, it would eliminate it, but that is the best I could do. This is an Elgin watch, so it couldn't be. You can't buy a diamond Elgin watch for \$55. I am no expert, Mr. Davis, but I know you can't get an Elgin diamond wrist watch for \$55.

Q. Had you bought any Elgin diamond wrist watch?

A. No, sir. I bought three watches from Laykin, and I paid \$55 for one, and \$65 or \$70 for another, and \$80 for another, and they were all Swiss watches.

Q. Which one did you give to Betty?

A. The \$55 wrist watch.

Q. Was she present when you bought it?

A. No. I bought it for her as a present when I was going with her, before we were married. It looks like "Elgin" to me.

Q. If it isn't an Elgin, an expert can tell?

A. Yes, an expert can tell you.

The Court: No, that isn't an Elgin. I think it is a "Welbow" or something like that, or "Welson".

(Testimony of Sydney M. Williams)

Q. By Mr. Davis: After looking at that—

A. I can't change my story. It could be and couldn't be the watch. It isn't a question of refreshing [142] my memory. I wouldn't know.

Q. You wouldn't know whether it was the watch you bought for her or not?

A. I couldn't possibly say. It was a square watch with diamonds around it.

Q. And the watch had a plain band?

A. A black band; that is right.

Q. A silk band?

A. Yes; you know, the regular black band.

Q. And you gave that to her before you married her?

A. Yes, about two years before, or a year and a half before.

Q. Did she wear it? A. Yes.

Q. Did you ever see her wearing it? A. Yes.

Q. Did you ever see her wearing it with the black band? A. Yes.

Q. Did she wear it after you were married?

A. No, she did not. That was in that little green box with that ring I bought from Mickey, that I was saving for my youngster, and my Elks pin.

Q. Did she wear that watch after she was married?

A. No.

Q. What watch did she wear?

A. I let her wear this watch that I got from Max, and [143] I also let her wear the big diamond ring, and then she wore the other ring on her other hand.

Q. When did she first commence to wear the watch which you say is described in the policy?

A. After we were married.

(Testimony of Sydney M. Williams)

Q. After you were married she never wore this Laykin watch? A. No.

Q. Handing you Plaintiff's Exhibit 8, that is a ring that—

A. I looked at that yesterday. I have never seen that ring before, to the best of my knowledge.

Q. You have never seen it before?

A. I don't remember seeing it before.

Q. That isn't the ring that is described in item No. 3 in the policy, is it?

A. No, sir. Mr. Riskin can tell you whether or not it is, but, to the best of my knowledge, it isn't.

Mr. Davis: Will you please not volunteer these statements?

The Court: Yes. You are volunteering.

The Witness: Yes, and I know better, too.

Q. By Mr. Davis: Will you just describe the friendship ring, item No. 3, the ring involved in the—

A. It was a 1-carat stone, and you have got the exact description here, with 14 smaller round diamonds set in [144] platinum.

Q. How does it compare with this ring here, I mean in appearance? You can tell us from the appearance can't you?

A. I would have to count the stones.

The Court: What was that? I didn't hear it.

A. I would have to count the stones. I count 12 stones in this and the center stone, and how big the center stone is I don't know.

Q. I thought there were 14. A. Are there 14?

Q. I don't know. A. 12 I count.

Q. 12 besides the— A. 12 and the center stone.

(Testimony of Sydney M. Williams)

Q. And the big stone? A. Yes.

Q. Do you know enough about these jewels to give us the approximate size of that center stone?

A. No, I don't. If I did, I wouldn't have these things appraised. I am not a jeweler.

Q. I asked you, in appearance was there any similarity to the ring you say was lost, item No. 3 there?

A. All diamond rings are alike in appearance.

The Court: That may be stricken.

Q. By Mr. Davis: It was the same general appearance ring, [145] was it, set in the same way?

A. I don't know whether it was set in the same way, but it is a large center stone, and diamonds around it, in a platinum ring.

Q. Mr. Williams, were you in San Diego some time in the late spring of 1940? A. No, sir.

Q. At no time?

A. No, sir, never with or without Mrs. Williams. I was separated from Mrs. Williams at that time.

Q. You were still going to the house frequently?

A. I was not. I couldn't get near that house. Every time I got there she either tried to knife me or shoot me or split my head open.

Mr. Davis: I move to strike that.

The Court: Yes. It may be stricken. We don't try divorce cases in this court.

The Witness: That is all a matter of record over there, your Honor.

Q. By Mr. Davis: Did you ever go down to San Diego during 1940? A. No, sir.

Q. Did you ever see Mr. Leitch?

A. Once in my life.

(Testimony of Sydney M. Williams)

Q. Only once? A. Yes, sir. [146]

Q. When was that?

A. It was when I defended his sister on a drunk driving case in some little town out here toward the beach.

Q. And you acquitted her?

A. I acquitted her, and he came out to the car, and Betty introduced him to me, and he thanked me very much for what I did for his sister.

Q. That wasn't his sister that testified here yesterday?

A. No. That is the other sister, Betty's friend.

Q. How did you get to court? Didn't they go to court with you? A. No.

Q. Mr. Leitch came up from San Diego and testified for his sister? A. I don't recollect that—

Q. Didn't he testify?

A. Not to my knowledge.

Q. To your recollection, did he?

The Court: He came out to what car, where?

A. After the trial.

The Court: Was that in Los Angeles County or in San Diego County?

A. That was in Los Angeles County, in some little township. She was with some sea captain at the time, and it was some town out near San Pedro, in some little J. P. [147] court.

The Court: Where was it he came to the car?

A. After the case was over.

The Court: Where was that?

A. Right in this town, right outside the courtroom.

The Court: He was there at the trial?

A. That is right.

(Testimony of Sydney M. Williams)

Q. By Mr. Davis: To the best of your recollection, you never bought that attachment for a wrist watch?

Mr. Penney: I object to that as having been asked and answered three or four times.

The Court: Well, I don't know. I am a little confused about it. He says, as I recall his testimony up to this moment, that he doesn't remember buying the diamond bracelet for the wrist watch, which was bought in 1937, but I don't recall that he testified that he never bought a diamond bracelet.

A. All I know is this, that ever since I got her the watch she wanted me to get her a diamond bracelet. I don't remember buying her a diamond bracelet. I won't say I didn't.

The Court: Did you give her that one?

A. I had that since 1936, that watch and diamond bracelet, all together.

The Court: Then you did have that?

A. Oh, definitely, since 1936. He is asking me now, did I pay over again for this watch, and I have to honestly say I don't know. I know she wanted me to buy it. I am [148] just going by her testimony, where she said I bought it for her. I don't remember buying it for her.

Mr. Davis: I move to strike that, if your Honor please.

The Court: It may be stricken.

Q. By Mr. Davis: Did you ever buy her any diamond bracelet attachment for a wrist watch?

A. Not to the best of my recollection.

The Court: When did you last see this one platinum diamond watch with diamond bracelet attachment con-

(Testimony of Sydney M. Williams)

taining 84 diamonds and two baguettes, which is item No. 1 on the list?

A. I would say some time in 1939.

The Court: You last saw it some time in 1939?

A. Yes. It was in the box with this other stuff.

The Court: She didn't have it on in Calexico?

A. No. She had this item No. 1.

The Court: I am asking you about item No. 1.

A. I am sorry. I thought you were asking me about the other one.

The Court: Item No. 1.

A. When did I last see item No. 1?

The Court: Yes.

A. New Year's Eve, 1939, she was wearing it at that time, in Calexico.

The Court: What happened?

A. We were held up.

The Court: She was not wearing this other watch?

[149] A. No, sir.

The Court: Where was this watch?

A. I don't know where this watch was, but I know she had another watch.

The Court: You are referring to the one you said you last saw in the green box?

A. I thought you asked me about wearing the watch that I bought her in 1937. That is the watch that I thought you were referring to.

The Court: It may or may not be Exhibit No. 7?

A. That is right.

The Court: The other two watches you say you bought about that time were ladies' watches?

A. Yes—not at that time. I bought one for a former wife and one for a girl friend.

(Testimony of Sydney M. Williams)

The Court: That is, besides the watch you bought for her? A. Yes, sir.

Q. By Mr. Davis: When you got that watch from Rosenthal, what did you do with it?

A. Kept it in the vault.

The Court: That is item No. 1? A. Yes, sir.

Q. By Mr. Davis: You kept it in the vault all the time? A. Yes, sir.

Q. Did you give your wife Elizabeth a wrist watch? [150]

A. I gave her a wrist watch, but not that one. I bought another one from Laykin. May I explain? I didn't—

Q. By Mr. Davis: Let me ask you specific questions. You bought another wrist watch and gave it to a girl friend? A. Yes.

Q. When did you buy that other wrist watch to give to your girl friend?

A. Before Betty and after the other one.

Q. Approximately what date?

A. Some time in early 1937, I would say.

Q. Some time in early 1937? A. Yes, sir.

Q. You were still married to—

A. We were getting a divorce.

Q. The divorce hadn't been started?

A. Yes, I bought it after the divorce had been started.

Q. You bought the wrist watch then and gave it to some other girl in 1937?

A. That is right—one like that \$55 one.

Q. When did you buy this wrist watch that you gave to your wife Esther? A. In 1934 some time.

Mr. Penney: I object to that as having been gone into.

(Testimony of Sydney M. Williams)

The Court: The objection is overruled.

Mr. Davis: Answer the question, please.

A. 1934 or 1935, I would say. [151]

Q. Then you bought another one in 1937 and gave it to this other girl? A. Yes.

Q. And then you bought the other Laykin watch and gave it to Betty? A. Yes, sir.

The Court: You bought all three of those from Laykin? A. Yes, sir.

Q. By Mr. Davis: And all that time you had another wrist watch in your vault?

A. Yes; but I bought those things for an investment, not to give to girls.

The Court: This watch No. 1, that is the one that was in your vault? A. That is right.

The Court: When did you buy that one?

A. That was in 1936, when I was handling Max Rosenthal's business.

The Court: You bought that from Max Rosenthal?

A. That is right—that and the big diamond at the same time.

Q. By Mr. Davis: That was in 1936?

The Court: I am a little confused. As I recall your testimony now, you said you paid nothing for Item No. 1.

A. Oh, no, your Honor. I got item No. 1 and item No. 5—[152]

The Court: In settlement with Max Rosenthal, after his divorce case? A. Yes.

The Court: And cancelled your fee?

A. Cancelled my fee, and gave him \$900 in cash—cancelled my fee and what he owned me. And the ring was appraised, retail, at \$2500.

(Testimony of Sydney M. Williams)

The Court: What year was that?

A. That was in 1936. These appraisals we have on this policy are not retail appraisals; they are import appraisals.

Q. By Mr. Davis: You kept the ring and the wrist watch you got from Rosenthal in your vault as an investment? A. That is right.

Q. That was in 1936, while you were married to Esther? A. Yes.

Q. You didn't give her either one of them?

A. No.

Q. You never let her wear them?

A. No, and she was angry about it, too.

The Court: Were there any orders about them?

A. We had a property settlement—it is a matter of record—and I kept the diamonds and jewelry I had.

The Court: Are these mentioned in there specifically?

A. No, not specifically.

The Court: And you were wearing this item No. 5 in [153] Calexico?

A. No, I wasn't wearing it. Betty was wearing it.

The Court: A man's ring?

A. No—a woman's ring, No. 5. Have I got the same list, your Honor?

The Court: One platinum diamond engagement ring. No. 6 is the gent's ring.

A. No. 6 I was wearing, yes.

The Court: No. 6 you were wearing?

A. Yes, sir.

Q. By Mr. Davis: Did I understand you to say that you did give the engagement ring to Betty when you became engaged?

(Testimony of Sydney M. Williams)

The Court: Item No. 5.

A. No. I did not. I gave—

The Court: He gave her No. 3.

A. That is right. You have it listed as a friendship ring. That is the way Mr. Lippert happened to draw up this appraisal. The one that says "Engagement ring" is one I had since 1936. The one that says "Friendship ring" is one I got her as an engagement ring before we were married.

Q. By Mr. Davis: And Mr. Lippert then drew up this schedule here, and did you discuss submitting that schedule to the insurance company—and that was on June 2nd—and the insurance company told you that they would write the risk provided you brought back an appraisal, and you got an appraisal from Lippert on June 23rd? [154]

A. I am sorry. I never told you anything like that in my life. If it wasn't drawn up by Lippert, it was drawn up by your company.

Q. It was drawn up by Mr. Horowitz, from your description?

A. I brought the jewelry in to him. He had the jewelry.

Q. You described these jewels for insurance purposes?

A. If Mr. Lippert didn't do it, Mr. Horowitz must have taken it right off of the jewelry.

Q. Did Mr. Horowitz put a valuation on the jewels?

A. Certainly not.

Q. There was a valuation put on them before Mr. Lippert's appraisal ever came in?

A. If there was, Mr. Horowitz put it on.

(Testimony of Sydney M. Williams)

Q. How many times before this alleged robbery had Elizabeth worn this bracelet and this wrist watch?

A. Every time we would go out.

Q. And all the time after you were married the wrist watch was the only wrist watch she wore?

A. That is right.

Mr. Davis: I think that is all.

The Court: You didn't keep it in the vault, then?

A. No, not after she started wearing it, and it was insured.

The Court: What about the platinum diamond engagement [155] ring, item No. 5?

A. She wore that all the time after that.

The Court: She wore that all the time?

A. Yes, sir.

The Court: Where did you keep the Elks pin?

A. That was kept in this little green box at the house.

The Court: Was that a man's Elks pin?

A. Yes. It was the most amazing thing I have ever seen. Nobody could wear it. It was solid platinum, and each one of the antlers had a big diamond.

The Court: And you kept that where?

A. Also in this green tin box. And she kept her wrist watch—

The Court: The one without the diamond band, and the cigarette case?

A. No. She used the cigarette case. The reason that stuff was in the box, I couldn't use the pin, and the ring was something I was saving for my youngster. The watch, she just never used it.

(Testimony of Sydney M. Williams)

Q. By Mr. Davis: I will ask you another question, then. When did you quit keeping these investment jewels in the safe deposit box?

A. After we were married.

Q. From then on, the jewels were kept in this tin box? A. Oh, no. [156]

Q. Where were they kept?

A. This tin box was just something that was put away, something we never went into.

The Court: He wants to know where you kept the jewels. A. These jewels?

Q. By Mr. Davis: All your jewels.

A. I will have to tell you what I have already. Those things were in the tin box, because they were never used, and the others she just kept in her jewel case in her dressing room.

The Court: What others?

A. All these others she was wearing.

The Court: These items 1, 2, 3, 4, 5, 6—you wore No. 6 all the time? A. Yes.

The Court: But items 1, 2, 3, 4 and 5, she never had those in the tin box? A. No.

Q. By Mr. Davis: Or in the safe deposit vault, or in the box, after you were married?

A. Even after we were married, before they were insured—I didn't want this insurance then, and Mr. Horowitz—

Q. You were married on June 3rd, weren't you?

A. Mr. Horowitz remarked that they should be insured.

The Court: That may be stricken. [157]

(Testimony of Sydney M. Williams)

Q. By Mr. Davis: You were married on June 3, 1939, is that right, to Elizabeth?

A. I would say about that time.

Q. And the policy was executed and delivered on the 2nd day of June, the day before you were married?

A. It doesn't stress the date definitely. It was around—I told you the things, when she started to wear them.

The Court: Where was this vault?

A. Security-First National Bank.

The Court: At Sixth and Spring?

A. Fifth and Spring.

Q. By Mr. Davis: From that time on they never went back into the vault? A. No.

Q. Did you give up the vault?

A. Yes, I did. I don't know when I gave it up, though. I don't have it now.

Q. Before that time had these other items, the Elks pin and the ring, the youngster's ring, been in the vault?

A. No. They weren't that valuable.

Q. And you had never insured these goods before?

A. No, never. [158]

* * * * *

ROBERT L. REYNOLDS,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. Robert L. Reynolds.

The Clerk: And your address?

A. 610 South Broadway, room 830.

(Testimony of Robert L. Reynolds)

Direct Examination

Q. By Mr. Davis: What is your business or profession, Mr. Reynolds?

A. Insurance investigator and adjuster.

Q. By whom are you employed?

A. By Toplis & Harding.

Q. Who are Toplis & Harding?

A. They are adjusters and investigators for insurance companies.

Q. Have you specialized in any particular type of insurance investigating?

A. Inland Marine Insurance, mostly.

Q. Inland Marine covers personal jewelry and such things? A. That is right. [159]

Q. Do you recall the incident of a loss being reported in the early part of January, 1940, by Sydney Williams?

A. I do.

Q. Will you state just how that matter first came to your attention?

A. It was January 2nd, 1940, that Mr. Horowitz telephoned my office and stated that one of his clients had a claim to make and he was sending him over.

Q. May I interject? Did Toplis & Harding adjust losses for Continental Insurance Company?

A. Yes, sir.

Q. Go ahead. A. And a short time later—

The Court: What time was that?

A. January 2, 1940. And a few minutes later Mr. Williams arrived in my office to tell me about the loss.

Q. Was he accompanied by Mrs. Williams at that time? A. No.

Q. Did Mrs. Williams ever come to your office?

A. No.

(Testimony of Robert L. Reynolds)

Q. Did you ever see Mrs. Williams? A. No.

Q. This is Mrs. Williams here in the courtroom now (indicating)? A. Yes. [160]

Q. Go ahead and tell me what took place?

A. I asked him to state the circumstances of this loss he was reporting, beginning with the time that he left Los Angeles on this trip to El Centro, and he proceeded to tell me the circumstances, how they left here on the afternoon or evening of December 30, 1939, and drove to Calexico, and obtained rooms at the Di Anzo Hotel, and then he told me about his friends, Mr. and Mrs. Brown, down there, and Mr. Brown being the Greyhound agent, and that they were visiting with them, and he went on and gave me the story of this alleged hold-up, as he himself outlined it here on the stand, which is substantially the same as he told me at that time.

Q. You heard his testimony this morning regarding how the alleged hold-up occurred? A. Yes.

Q. You were in the courtroom? A. Yes, sir.

Q. And that is substantially the way he told the story to you at that time? A. Yes.

Q. What did you do toward adjustment of the loss? Did you discuss the matter of the amount of the loss with him?

A. In this particular case there are two policies involved. One is an all-risk scheduled policy, where the [161] items are specifically described and the amount of insurance specified on each item. The other policy is what we call a scheduled property floater policy, which is blanket insurance on personal property, with a limited liability on jewelry and furs. On an all-risk policy, when you have an appraisal made by a qualified jeweler, you don't enter into any discussion of value at the time a loss

(Testimony of Robert L. Reynolds)

is reported. When it comes time to make a settlement of the case, you sometimes go into values. However, on a personal property floater it is of interest to know something about original cost and places of purchase on the items involved, even though you have a limit of \$250 on jewelry under that type of policy, and you do ask the assured for some information on those items. When we discussed the items that were not specifically scheduled on the all-risk policy, he informed me that he had lost a diamond friendship ring, which he described as having a large center diamond, with 14 small round stones set in a platinum mounting. I asked him—

The Court: That is what item? Have you got Exhibit 1 before you?

Mr. Davis: Yes, your Honor. I had better make an explanation. We have been referring to the items on the one policy, on the scheduled jewelry policy. The two items, that is, items 2 and 3, on the scheduled jewelry policy, that is, the platinum diamond wedding ring and the diamond friendship ring, were eliminated from that policy by [162] endorsement on August 15th, at the time the unscheduled policy was written.

The Court: It was transferred to another policy?

Mr. Davis: Yes, it was transferred to a blanket policy. They are both involved here, and, just to keep the record clear—and we don't have the policy—with counsel's permission, I am going to—

The Court: Why not let this be Plaintiff's Exhibit 1 in the discussion of the items, because that is the same list which was set forth in the complaint, and it is the list which I have been following, and which all of the witnesses have been discussing.

Mr. Davis: I will hand him the daily report.

(Testimony of Robert L. Reynolds)

The Court: I am handing him Exhibit 1.

Mr. Davis: He has Exhibit 1 there?

The Witness: Yes. Apparently this item No. 3 of this schedule, that not being scheduled on the policy, having been removed from the all-risk policy, the insurance coverage was under the personal property floater, and I asked him where that ring was purchased, and he told me he bought it from Riskin, and that it cost wholesale, he said, \$375. The other item of personal property floater consisted of cash money, \$96.

Mr. Penney: Your Honor, I am confused. I seem to have the wrong list here.

The Court: Have you the complaint? [163]

Mr. Penney: I have the complaint, your Honor, but—

Mr. Davis: The list he has there was copied from the complaint.

The Court: Plaintiff's Exhibit No. 1 has the same item numbers and descriptions as paragraph 5 of the complaint. Plaintiff's Exhibit No. 1 is the one that each of the witnesses so far have used in testifying or referring to the items. Now, that is item No. 3.

The Witness: He also reported cash money in the amount of \$96, and a Gruen wrist watch, Curvex model, valued at \$125.

The Court: That is what he paid for it, you say?

A. That is the value he reported. He described it as being a solid yellow gold case, with a gold dial and gold numerals. I was familiar with the value of the watch, and I knew it was a \$125 watch, so I didn't even ask him where he bought that one. However, in discussing the purchase of that item that appears as No. 3 on Exhibit 1, I asked him about that, and he volunteered the informa-

(Testimony of Robert L. Reynolds)

tion, without my asking it, simply as a matter of conversation, I took it, information as to the values on the items appearing on this unscheduled policy, particularly item No. 5. He volunteered the information that that ring cost him more than \$3,000. Inasmuch as I intended to communicate with the jeweler who had made the appraisal, to verify the appraisal and ascertain if the items could be duplicated at the amount of the [164] appraisal or less, I didn't question him on the original purchase price or places of purchase on the unscheduled items.

Q. Then what further did you do, following that?

A. Well, inasmuch as this loss was reported to have occurred in Calexico, I referred the investigation of the case to our representative, the Lyle Adjustment Bureau, in that territory, and they made the investigation, in co-operation with the police department and the sheriff's office in that territory.

Q. Was any trace of this lost jewelry ever found?

A. No.

Q. Did you ever tell Sydney Williams that the jewels had been traced to Mexico City?

A. No, I did not. We never traced them there.

Q. Were you or any of your investigators working for you ever able to find any trace of these jewels?

A. No, we did not.

Q. You followed your usual procedure in making your investigation? A. I did.

The Court: Did you see Sydney Williams again after that? A. Yes, I saw him once after that.

The Court: In your office?

A. Yes, he came to my office with Mr. Lewbel.

(Testimony of Robert L. Reynolds)

Q. Did you again discuss the case with him?

A. To the best of my recollection, we did discuss it. [165] However, I had full information on the case, and I didn't make any further notes on it. Mr. Lewbel simply stated that Mr. Williams was a friend of his and told me something about Mr. Williams himself, and hoped that our investigation would result in the recovery of his property.

The Court: Who is Lewbel? Is he one of your agents?

A. No. He is a man we used sometimes on appraisal work involving merchandise destroyed, and things of that kind. He works for various insurance companies, I understand.

Q. By Mr. Davis: When was that statement, approximately, with relation to the—

A. I would say that was within the same week or ten days of the original interview.

Q. Did you hear from Mr. Williams at the time the investigation was under progress?

A. I talked with him over the telephone a few times.

Q. What finally was the result of the investigation of the reported loss?

A. Ordinarily in a case of this kind we usually take 30 days for an investigation. In this particular case we took considerably longer. We weren't particularly pleased with the case, and we went into it very thoroughly, and finally, after a lapse of approximately 60 days, and no evidence having been uncovered that indicated that the case was not in order, and no trace of the property had been obtained, there didn't seem to be any prospect of solving the [166] case, so we prepared the proofs of loss

(Testimony of Robert L. Reynolds)

for the assured's signatures, the proofs were obtained, and on March 4, 1940—

Q. Pardon me. Let me interrupt you a minute. I am handing you Plaintiff's Exhibits 5 and 6, and will ask you if those are the documents you refer to as the proofs of loss? A. That is right.

Q. And those documents were prepared in your office and under your direction? A. That is right.

Q. Then what did you do with them, after you prepared them?

A. They were mailed to the assured.

Q. Whom were they mailed to—Sydney Williams or Elizabeth Williams, or both?

A. I will have to refer to my file. They were either mailed to Mr. Williams or to Mr. Horowitz. I will tell you in just a moment. They were mailed to Mr. Williams on February 19, 1940.

Q. Then did they come back to you?

A. Yes, they were returned to my office, and I forwarded them on to the insurance company on March 4, 1940.

Q. When they came back were they executed and signed by Elizabeth Williams and Sydney Williams, with a notarial acknowledgement attached?

A. That is right. [167]

Q. Now, you recommended payment of this loss to the company; is that right?

A. I don't recall whether I recommended it or simply submitted it. I think my final report is in your possession. It is not in my file.

Q. I don't find it right now. I will put it in another way and withdraw that question. Did you, within 60

(Testimony of Robert L. Reynolds)

days—that is the time provided for in the policy within which to pay the loss, isn't it? A. Yes.

Q. 60 days after submission of the proof?

A. Yes.

Q. Within 60 days had you uncovered any evidence which, in your opinion, justified you in advising the company not to pay the loss?

A. We were unable to obtain any.

Q. Either way? A. No.

Q. And you submitted it to the company and advised the payment of the loss? A. That is right.

Mr. Davis: I think that is all.

Cross-Examination

Q. By Mr. Penney: Your duties are not only to check the facts of the loss, but also to check the valuations; isn't that true? [168]

A. On unscheduled property, yes.

Q. Mr. Williams gave you the names of the parties with whom he had dealt in connection with the obtaining of this jewelry, didn't he? A. Yes.

Q. And you contacted those parties, didn't you?

A. I contacted Mr. Lippert by telephone at Vandike 7904, and asked him if he made this appraisal, and he varified the fact that he had, and in these amounts.

The Court: Did I understand that Mr. Williams gave you the names of all the people from whom he purchased the items?

A. No; just the one item on the unscheduled one, the one which had been removed, the friendship ring.

Q. By Mr. Davis: But you have what is known as a value form policy, haven't you? A. No.

(Testimony of Robert L. Reynolds)

Q. Isn't there a value form?

A. An all-risk policy is not a value form policy. At least I have worked for 17 years under the instructions that an all-risk policy is not a valued form policy. My understanding is that they are not allowed to be written in this country.

Q. Isn't it a fact that on one of these policies before the risk is written, that there was a valuation placed on the jewels? A. That is right. [169]

Q. So that you have no occasion, when it comes to an adjustment, to question the values placed on those particular items?

A. It all depends on the circumstances. Only with Mr. Lippert verifying the fact that he had made the appraisals as of certain amounts on a certain date, and I inquired from him if they could be duplicated at the present time, and if they could have been duplicated for less money I would have approached Mr. Williams with the idea of making replacements, rather than paying this in cash.

Q. You didn't offer to replace, in this case?

A. Mr. Lippert discouraged it, discouraged me.

Q. As a matter of fact, he told you that these articles couldn't be replaced for anywhere near the amount of the insurance, didn't he?

A. If I recall right, he told me he couldn't replace them at any savings to the insurance company.

* * * * *

Mr. Penney: Your Honor, one of these witnesses advised me that she has been called by the plaintiff in this case, and Mr. Lippert is in court, and I don't know—

The Court: Do you wish to call him as one of your [170] witnesses?

Mr. Penney: No, your Honor, not at this time. [171]

* * * * *

Mr. Penney: Your Honor, the defendant Sydney Williams moves to dismiss, under Section 41(b), on the ground that under the facts and the law the plaintiff has shown no grounds for recovery in this case.

If the court desires them, I think there are a very few short cases pertaining to this matter. Your Honor, looking at it in the most charitable way, so far as the defendant Mrs. Williams is concerned, this would have to be a conspiracy and tried on that theory. The only evidence this court has before it at this time of any fraud of any kind comes from the lips of Mrs. Williams. No other witness has testified in this case on any subject matter pertaining to facts that would in any way implicate Mr. Williams. [172]

* * * * *

The Court: Do you have some other matters in your motion?

Mr. Penney: No, your Honor. [173]

* * * * *

The Court: I am inclined to think that your analysis is probably correct. The motion for a non-suit will be denied. [175]

* * * * *

LOIS BROWN,

called as a witness on behalf of defendant Sydney M. Williams, being first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. Lois Brown.

The Clerk: And your address?

A. Burbank, California.

The Court: And the street address?

A. 1513 North Naomi Street.

Direct Examination

Q. By Mr. Penney: Miss Brown, will you speak loud enough so that I can hear you?

A. All right. I will try.

Q. What is your husband's business or occupation?

A. He is in the wholesale produce business.

Q. What business was he engaged in in 1939?

A. In the growing of produce, and he also had the Greyhound agency in Calexico.

Q. Did you have occasion to see Mr. and Mrs. Sydney Williams in the latter part of December, 1939?

A. Yes. They came down to visit us on the 30th.

Q. That is, Mrs. Williams, who is sitting here at the counsel table, and Mr. Williams?

A. That is right.

Q. What time did they arrive there, if you recall?

A. Sometime in the afternoon of December 30th.

[176]

Q. Were you with them that day? A. Yes.

Q. Were you with them the following day?

A. That is right.

(Testimony of Lois Brown)

Q. Were you with them all day, or were they outside of your presence at any time?

A. I think they went to the hotel, and came back to see us again, but most of the day we were together.

Q. Did you observe whether or not Mr. or Mrs. Williams were wearing any jewels of any kind on that occasion? A. Yes, they were.

Q. Will you describe the jewels that Mrs. Williams was wearing?

A. I just saw Mrs. Williams for the first time that day, but she had on a diamond bracelet on her right hand, and a diamond ring, and then on her left hand was a wrist watch with a wide diamond band, and a very large engagement ring.

The Court: She had rings on each hand?

A. Yes, sir.

Q. Did you see them on both the 30th and the 31st, that is, these rings and the jewelry you have described?

A. Yes, I did.

Q. Mrs. Brown, on the day of the 31st, what, if anything, did you and Mr. Brown and the Williamses do that day?

A. Went out to eat together in Mexicali. [177]

Q. What time was that?

A. That was in the evening. Earlier in the day we had taken a trip into Mexico and had taken pictures in Mexicali.

Q. Were you with them all the afternoon of the 31st?

A. Yes, I believe I was.

Q. What time did you return from this trip to Mexico? A. I would say in the late afternoon.

Q. When did you next see them?

A. We went out to dinner.

(Testimony of Lois Brown)

The Court: You went directly to dinner?

A. No. We came back first.

The Court: You mean they left you?

A. Yes; they went to their hotel.

Q. By Mr. Penney: How long were they gone, Mrs. Brown?

A. Not so very long. Then they came back to the Greyhound agency, and we couldn't go over to dinner with them at that time, so they went ahead and went over to the Gangrenous in Mexico, and Mr. Brown and I joined them later on.

Q. Do you recall about what time it was you joined them?

A. I would say about 7:00 o'clock. It might have been earlier, but about that time.

Q. Then what occurred after that?

A. We came back to the American side through the [178] Customs, and Mr. Brown and I had to stay at the station to meet some friends coming from Mexico City, and Mr. and Mrs. Williams went to the hotel. And they were to meet us at our house later on that evening, and we were going to this party in Mexico.

Q. Did you see them later that evening?

A. Yes, I did.

Q. About what time did you see them?

A. I would say it was about 9:00 or 9:30 in the evening.

Q. And where were they at that time?

A. Mr. Brown and I went home and dressed, and Mr. and Mrs. Williams rushed through the door, rapped on the door and said, "Let us in. Get the police," or "Where is your telephone?" They were very excited. And Mr. Brown and I both went to the door and let them

(Testimony of Lois Brown)

in. And we didn't have a telephone in our apartment. So Mr. Williams was very excited and Mrs. Williams was very nervous, and we took them in our car and took them over to the Calexico police station.

Q. Did Mrs. Williams go with Mr. Williams to the police station? A. Yes; we all rode over.

Q. What, if anything, did Mrs. Williams state in your presence in regard to this robbery?

A. When I opened the door, she told me they had been held up, and they were very much out of breath, and she told [179] me, "I just lost my jewelry, my bracelet" or wrist watch—I don't know—I don't recall just which —had lost her jewelry, and Mr. Williams had lost his watch and his ring. And they were very excited. And I was very nervous at that time, and we took them over to the police station; Mr. Williams wanted the police.

Q. On the afternoon of December 31st, while you were with Mr. and Mrs. Williams, did you go to Yuma at any time? A. Oh, no, I did not.

Q. You didn't see Mr. Williams throw a wrist watch in the All American Canal that afternoon, did you?

A. I didn't see the All American Canal that afternoon. We weren't near it.

Mr. Penney: You may cross examine.

Cross-Examination

Q. By Mr. Bledsoe: Were you with them on the 30th at Yuma?

A. I didn't go to Yuma at any time.

Q. You went to the police station with them?

A. Yes.

Q. And everybody was excited?

A. That is right.

(Testimony of Lois Brown)

Q. Do you remember talking to one of the police officers there?

A. I didn't talk to them at any time.

Q. You heard Mrs. Williams and the police officer [180] talking? A. Yes.

Q. Did you hear the police officer say, "You don't act like a man who had been held up", to Mr. Williams?

A. I did not.

Q. When Mr. Williams was at the police station had he been drinking? A. No, that is not correct.

Q. Had he had anything to drink?

A. Not to my knowledge.

Q. Did Mrs. Williams wear a coat?

A. Yes, sir.

Q. Was the bracelet below the sleeve of the coat?

A. I noticed it when we were having dinner.

Q. Did she have a long sleeve dress on?

A. No.

Q. She had gloves on? A. No.

Q. When was the last time you saw this jewelry on Mrs. Williams? A. When we were having dinner.

Q. That evening? A. That is right.

Q. You don't know whether there was a robbery or not, do you? A. I don't know, only what— [181]

Q. Shortly after this occurred, you and Mr. Brown left Calexico and went to Burbank?

A. We didn't leave Calexico until April, 1940.

Q. Is Mr. Brown in court? A. No, he is not.

Q. Is he available? A. Not just now, no.

Q. Where is he? A. He is in Arroyo Grande.

Q. Have you lived in Burbank ever since you left Calexico? A. No, I haven't.

(Testimony of Lois Brown)

Q. How long have you lived in Burbank?

A. I lived in Burbank from April, 1940, until November of 1941.

Q. And from September 1, 1943, until the present time—pardon me.

A. From September 1, 1943, until the present time.

Q. Did your husband register with the Burbank draft board? A. Yes, he did.

Mr. Penney: I am going to object to this, your Honor. I can't see the materiality of it.

The Court: I suppose it is foundation for the purpose of impeachment.

Q. By Mr. Davis: Since September, 1943, you have lived [182] in Burbank, California, at the same address that you have given here? A. Yes, that is right.

Q. Now let me ask you one further question. Have you used the name of Gassoway in the past?

A. That is my maiden name.

Q. Have you used the name Yager?

A. That is my stepfather's name.

Q. Have you ever used the name Edwards?

A. I was previously married to Irving A. Edwards.

Q. You are not married to him now?

A. That is right, but I used that name while I was married to him.

Q. Have you used the name Salot?

A. I refuse to answer that question.

Q. Did you use the name—

The Court: Just a moment. On what ground do you refuse to answer?

A. I have a son, and I don't want to talk about it.

The Court: I don't think that is a proper ground for refusing to answer. You can refuse to answer it on

(Testimony of Lois Brown)

the ground that it might incriminate you or degrade you, but not on the ground that you are protecting somebody else. I instruct you to answer the question.

A. Yes.

The Court: You have used the name of Salot? [183]

A. That is right.

Q. By Mr. Bledsoe: You have used the name of Warner? A. No, sir.

Q. Haven't you used the name Warner recently?

A. No, sir, I have not.

Q. Do you remember verifying under oath the complaint or petition filed in the Superior Court of the State of California in and for the County of Imperial, on or about the 16th day of November, 1943, before Clarence B. Smith, a notary public?

A. I had a case in El Centro at that time, in Imperial County, yes.

Q. Do you recall verifying the complaint at that time?

A. I don't understand what you mean.

The Court: Where is it? Show it to counsel first.

Mr. Penney: Your Honor, I haven't any objection to the court seeing this. I want to say, however, that it is obviously nothing more or less than an attempt to bring in extraneous matters. I can't see the materiality of it.

The Court: Counsel hasn't asked any question yet. He has a paper, which he is proposing to show the witness, and I asked him to show it to you. You may pursue your interrogration.

Q. By Mr. Bledsoe: Showing you, Mrs. Brown, what purports to be a copy of a complaint filed in Imperial County, I will ask you to look at it and tell us whether or [184] not you signed the verification on the last page?

(Testimony of Lois Brown)

The Court: Is that a certified copy?

Mr. Bledsoe: It is not.

The Court: It is a signed copy?

Mr. Bledsoe: Yes. My question was, if she remembered— A. I have never signed this.

Q. By Mr. Bledsoe: Do you recall filing a suit against Mr. Salot in Imperial County?

A. That is right.

Q. Some time in November, 1943?

A. That is right.

Q. Is that it there? A. This is the suit.

Q. And in that suit you stated that you were a resident of Imperial County? A. I was, yes, sir.

The Court: This will be marked for identification.

Q. By Mr. Bledsoe: In November, 1943, were you a resident of Imperial County? A. Yes, sir.

Q. Didn't you state that you lived in Burbank?

A. You asked me where Mr. Brown lived.

Q. I asked you where you lived, and didn't you state that you lived in Burbank since September, 1943?

A. I understood you to ask me where Mr. Brown lived.

The Court: I think he asked you whether you had lived, [185] since September, 1943, up to the present time, in Burbank.

A. I beg your pardon. I lived in Burbank from April, 1940, until November or December of 1941. Then I understood him to ask about Mr. Brown being with the Burbank draft board.

The Court: He asked you whether you had lived there since September 1, 1943, to the present time, and then he

(Testimony of Lois Brown)

asked you about the draft board. What is your answer now?

A. I have been a resident of El Centro most of that time.

Q. By Mr. Bledsoe: Couldn't you file that petition in Imperial County? Mr. Salot was living in Los Angeles County? A. Yes, sir.

Q. And you were living in Burbank with your husband? A. No.

Q. Didn't you go down there for the sole purpose of filing that complaint?

Mr. Penney: I can't understand the object of cross examining her on this. That hasn't anything to do with this case.

The Court: Apparently it is for impeachment purposes, to show that at a certain time she made a contrary statement under oath. Objection overruled.

A. Mr. Salot said he would embarrass me if I came up and testified for Mr. Williams, that he would attempt to embarrass me.

The Court: That may be stricken from the record.
[186]

Mr. Bledsoe: May I have the paper? I would like to offer that in evidence at this time, if the court please. Referring to the last paragraph, if I may—

The Court: I don't know which paragraph you are talking about.

Mr. Bledsoe: The last paragraph of the complaint, and the fact that she states that she is a resident of Imperial County. If there are any other matters in there which might embarrass her, they may be stricken. It is not my purpose to embarrass this witness.

(Testimony of Lois Brown)

The Court: "That plaintiff is at present residing in Imperial County, California." It is a public document in Imperial County.

Mr. Bledsoe: Yes, your Honor.

The Court: It will be admitted in evidence.

The Clerk: Plaintiff's Exhibit No. 9.

The Court: It will be Plaintiff's Exhibit No. 9. Any redirect?

Redirect Examination

Q. By Mr. Penney: Were you residing at that time in Imperial County, with your child, at the time of that affidavit? A. I was, yes, sir.

The Court: You said your name was Gassoway. You mean that was your maiden name?

A. Yes, sir. [187]

The Court: That was your father's name?

A. Yes, sir.

The Court: And Yager was your stepfather's name?

A. Yes, sir.

The Court: And then you were married to Edwards?

A. That is right.

The Court: And you were married to Salot?

A. I was not.

The Court: You were married to Brown?

A. Yes, sir.

The Court: And you are still married to Mr. Brown?

A. Yes, sir.

Q. By Mr. Penney: How long had you been in Calexico, you and your husband, prior to December 31, 1939?

(Testimony of Lois Brown)

A. I believe it was about September 1st to 15th that I moved there.

Q. In 1939? A. 1939.

Q. Mr. Brown's brother owned and conducted a service station? A. No. It is in Mr. Brown's name.

Q. His brother was there? A. Yes, sir.

Q. And you were living at his brother's home, were you? A. I was living with Mr. Brown's family.

Q. Did Mrs. Williams come down to see you? [188]

A. Yes, sir.

Q. Did she let you know beforehand that they were coming?

A. Mr. Brown and I had invited them down.

Q. When?

A. We had been in Los Angeles some time in November and visited them, visited Mr. Williams at his office, and we invited them down at that time. I had never met the present Mrs. Williams, and it was agreed that they would come down during the holidays.

Q. Was Mr. Williams your attorney at that time?

A. No, he was not.

Q. Did you know beforehand that they were going to be there New Year's Eve, a day or so before?

A. I knew they were coming down that week. I didn't know just what day.

Q. Did you invite them to stay at your home?

A. No, we did not.

Q. You didn't know they were there until after they registered in the hotel?

A. I couldn't say. I don't know. [189]

* * * * *

SYDNEY M. WILLIAMS,

having been heretofore duly sworn, upon being recalled as a witness in his own behalf, testified as follows:

Direct Examination

Q. By Mr. Penney: Mr. Williams, did you at any time, in the City of Burbank or at any other place, while riding with your wife, tell her, in substance or effect, that you contemplated having a hold-up in order to collect the insurance money upon your jewelry?

A. No, sir.

Q. Did you at any time ever purchase for her, for \$1.95 or \$2.95, an imitation diamond ring?

A. No, sir.

Q. When you went to Calexico on the 30th day of December, 1939, did you, upon that day or upon the 31st day of December, ever go to Yuma or to the All American Canal? A. No, sir.

Q. Did you, Mr. Williams, at any time, ever throw a [190] watch in the All American Canal or any other canal? A. No, sir.

Q. After the robbery of the 31st day of December at Calexico, did your wife throw away a ring of any kind? A. No, sir.

Q. Did you at any time suggest to your wife that you would falsely report a theft of the property covered by the insurance? A. No, sir.

Q. Mr. Williams, in the fall of 1941, during this divorce proceeding, did you have any conversation with your wife in which she threatened that she would accuse you of this particular matter? A. Yes.

Q. Where did that occur?

A. She called me up on the telephone at my law office.

Q. Did you recognize her voice? A. Yes.

(Testimony of Sydney M. Williams)

Q. What, if anything, did she tell you at that time?

A. She told me that unless I turned over the stock she wanted and settled the property the way she wanted, she was going to go to the insurance company.

Mr. Davis: I move to strike that. He put it as an impeaching question.

The Court: Sustained.

Mr. Penney: You may cross examine. [191]

Cross-Examination

Q. My Mr. Davis: Mr. Williams, you say you did not go to Yuma during this trip to Calexico in December of 1939?

A. That is right. We took a ride both days with the Browns.

Q. I just asked you that question.

A. I don't even know where Yuma is from there.

Q. I will ask you if you did not, on January 2, 1940, tell Bob Reynolds that you and Elizabeth, on your trip to Calexico, and on December 31, 1940, drove to Yuma about 10:00 o'clock in the morning, and return to Calexico at about 6:30? Did you not make such a statement?

A. No, sir.

Q. To Mr. Reynolds? A. No, sir, I did not.

Q. Or at any other time? A. No, sir.

Mr. Davis: That is all.

Mr. Penney: That is all. At this time, your Honor, I wish to adopt the testimony which Mr. Williams gave under Section 43(b), when he testified under cross examination by Mr. Davis.

The Court: All right. You may do so.

Mr. Penney: I would like to call Mrs. Williams at this time under Section 43(b). [192]

ELIZABETH J. WILLIAMS,

having been heretofore duly sworn, upon being recalled as a witness by Sydney M. Williams, under the provisions of Section 43(b), testified as follows:

Direct Examination

Q. By Mr. Penney: Mrs. Williams, referring now to Plaintiff's Exhibit No. 8, I want you to examine that ring carefully and tell me whether or not that is one of the articles which you testified was put between two boards and placed in the attic? A. It is.

Q. Is it in the same condition now as it was at that time? A. Yes, sir.

Q. How big a hole did Mr. Williams carve in these two by fours?

A. Well, I can't tell you exactly, but I imagine about an inch deep.

Q. And he did that with what?

A. A screwdriver and a hammer, and I believe a small chisel.

Q. He took the jewelry and placed it in the opening of the two by fours; is that right?

A. Of the two by fours.

Q. He carved each one of them, did he?

A. Yes, sir. [193]

Q. Did he have a ruler of any kind?

A. I don't remember him having one.

Q. Did he mark it with a pencil in any way?

A. He probably measured so the holes would fit together.

Q. After he had placed the jewelry in there—I presume he put some on one side and some on the other; is that right?

A. I imagine he put it on one side.

(Testimony of Elizabeth J. Williams)

Q. You saw him do this, didn't you? A. Yes.

Q. Did he place them all on one side?

A. I can't say whether he did or not.

Q. You saw him cut two holes in these boards?

A. Yes; I was in and out of the room, and I saw him.

Q. After he placed them inside, what, if anything, did he do?

A. He had the diamonds in a small handkerchief, and he put plaster of paris—or some other—I believe plaster of paris over it.

Q. What does plaster of paris look like?

A. Well, it is a white powder that hardens when mixed with water.

Q. Did you have plaster of paris in the house at that time? A. No. He bought a can. [194]

Q. Bought a can of plaster of paris and cemented it over? A. Yes.

Q. And took the two boards and nailed them together; is that right? A. That is right.

Q. That was on what date?

A. It must have been on the 29th of December, because we went to Calexico on the 30th.

Q. You never saw that jewelry again until—

A. Until we went to San Diego.

Q. And when was that?

A. Oh, the latter part of May or the first of June.

Q. Of 1940? A. Yes, sir.

Q. You had never attempted to look in between these boards, had you, to see if the jewelry was still there?

A. No.

Q. And you had separated from your husband on the 8th of May, 1940? A. That is right.

(Testimony of Elizabeth J. Williams)

Q. You were quarreling with him, were you not, over the division of property, during that period of time?

A. No, sir.

Q. The subject was never mentioned?

A. It probably wasn't mentioned. [195]

Q. This particular ring here is now in its original setting; is that right?

A. It is the setting that it was in when Mr. Williams gave it to me in 1937.

Q. And it is in the same condition now as it was then?

A. Only it has been made smaller since he gave it to me in 1937.

The Court: Where is the original of the deposition?

Mr. Penney: I have the original.

The Court: Do you want to file it?

Mr. Penney: I don't know what the custom in this court is in regard to these originals. Some of the courts don't permit you to file them. I will file it, if the court desires.

The Court: I think it ought to be filed if you are going to use it.

Mr. Penney: All right, sir.

Q. Which of these rings is described in Plaintiff's Exhibit No. 1 for identification? A. This one.

Q. That is known or designated as the friendship ring; is that correct? A. Yes, sir.

Q. That is the ring that you wore on your little finger? A. Yes, later. [196]

Q. I will ask you to look, on page 13 of your deposition, at the question commencing on line 16, and the answer on line 19. Have you finished reading it?

A. Yes, sir.

(Testimony of Elizabeth J. Williams)

Q. You were sworn to testify, in the deposition which was had on Sunday, the 10th day of December, at the office of your attorney, Mr. Taylor? A. Yes, sir.

Q. At room 735, in the I. N. Van Nuys Building in this city? A. Yes, sir.

Q. And did you testify as follows to this question:

"Q.—You told me about the watch and the engagement ring. Now, what other rings did you have at that time that he broke up?"

And did you answer: "The ring that I wore on my small finger, and a bracelet, a diamond and emerald bracelet, and Sydney's two-carat stone." Did you so testify?

A. If it is in my deposition, I did, but that wasn't correct, because he didn't have my little finger ring.

Q. Wait a minute. How can you explain the fact now that this ring has not been broken up?

A. You were asking the question so fast, Mr. Penney, that I just got mixed up.

Q. I cautioned you, did I not, that if there were any questions which I asked of you which you didn't understand, [197] not to answer, but to ask me for an explanation, didn't I?

A. Yes, you said that, but you were asking them so fast and I was answering so fast.

Q. That is not a fact, however?

A. No. This is a ring that I wore on my left hand, and Sydney gave it to me in 1937, and after he bought the three-carat stone we had it cut down at Mr. Laykin's, and I wore it on my right hand.

The Court: What finger? A. My small finger.

(Testimony of Elizabeth J. Williams)

Q. By Mr. Penney: Now, Mrs. Williams, when you returned from San Diego, after breaking up the jewelry, where did you go?

A. I went home. Mr. Williams took me home.

Q. And left you there? A. Yes, sir.

Q. What, if anything, did you do with the jewelry you had at that time?

A. What jewelry, Mr. Penney?

Q. The jewelry that you came back with.

A. Mr. Williams took them and put them in a little box, a little green box.

Q. Did he come in the house?

A. He came in the house.

Q. What time did you arrive home that day?

A. Well, I should judge—I don't know exactly, but [198] 9:30 or 10:00 o'clock at night; maybe a little before that. I don't remember, Mr. Penney.

Q. They were put in a green box and kept there; is that right? A. For a while, yes.

Q. Let us turn to page 18, line 10. I will ask you to look at your deposition on page 18, starting with line 10 and ending with line 14. Have you read it?

A. Yes, sir.

Q. All right. I shall now ask you whether you made the following answer in response to the following question at the time of taking the deposition in Mr. Taylor's office?

A. I probably did.

Q. Wait a moment. A. I am sorry.

Q. Perhaps I had better start at line 7—speaking about the jewelry: "And where were they when you last saw them?" And then the answer: "In the same unfinished room that we put them in after we came from San Diego, in that attic."

(Testimony of Elizabeth J. Williams)

"Q.—He took them back up into the attic, did he, and put them under the boards?

"A.—Yes, sir, he put them under a board.

"Q.—He did not put them between boards?

"A.—No."

Did you so testify? [199]

A. I did, but, as I said—

Mr. Davis: Just a minute. I will object to that. That is not impeaching. The question is, what she testified to here.

The Court: It goes to the weight of the testimony.

Q. By Mr. Penney: Mrs. Williams, you told us about an incident which occurred while you were riding in Burbank with Mr. Williams? A. Yes, sir.

Q. Where were you in Burbank at the time of that conversation? I am speaking now of the conversation in which he mentioned the subject of a robbery.

A. We had just turned off of Main Street—I don't recall the street, but we were on our way home.

Q. From where?

A. I think we had been to a show.

Q. What time of the day or night was it?

A. Well, we went to the early show, 7:00 o'clock or 7:30.

Q. And what did Mr. Williams say to you?

A. He said this would be a good place to have a hold-up.

Q. Is that the first time he ever mentioned it to you?

A. Well, yes, I think it was the first time.

Q. Or do you recall any other conversation in that regard prior to that time? [200] A. No, I don't.

Q. Mr. Williams said to you, "This would be a good place for a hold-up"? A. Yes, sir.

(Testimony of Elizabeth J. Williams)

Q. Is that all he said? A. Yes.

Q. Did you say anything?

A. I probably commented on it. I don't remember what I said.

Q. Did you discuss it further after you went home?

A. Not at that time, no, sir.

Q. When did you next discuss any question regarding a hold-up-with Mr. Williams

A. Just before we went to Calexico.

Q. How long before?

A. Well, I don't remember how long before.

Q. A couple of weeks before?

A. No, it wasn't that long before, I don't think. It has been a long time ago, Mr. Penney, and I can't remember the exact day.

Q. How many conversations did you have with Mr. Williams in regard to a hold-up?

A. I don't know. I can't tell you how many conversations we had. I don't remember how many times we talked about it before we went to Calexico.

Q. At some time or other Mr. Williams, according to [201] your testimony, had told you that you needn't worry, that he was a lawyer and would keep you out of trouble?

A. That is right; he did say that.

Q. I am trying to find out when that was.

A. On our way back from San Diego.

Q. That is the first time, to your knowledge; is that right?

A. About him being an attorney and he would get me out of it, yes, as I remember.

Q. Let us take the conversation you had prior to the time you went to Calexico. What was said on that occasion in regard to a robbery?

(Testimony of Elizabeth J. Williams)

A. A few days before we were supposed to go to the Rose Bowl game—I don't know how many days it was before we went—Mr. Williams asked me if I had ever been to Calexico, and I had been there, and he asked me if I would like to take a trip, and then he told me why we were going.

Q. What did he say to you?

A. That he was going to have a phony hold-up so he could use the money in the market.

Q. And what did you say?

A. I don't remember what I said, Mr. Penney, but it wasn't a good idea. I have never done anything like that before, and naturally I was nervous about it.

Q. You told him at that time, surely, that you didn't want to do it? [202] A. Yes, I suppose I did.

Q. Wasn't it on that occasion that he told you not to worry about it, that he was a lawyer and would keep you out of trouble?

A. No; I think it was on the way back from San Diego. On the way back he did tell me that.

Q. You told him on that occasion that you didn't want to do it, didn't you, when he told you up here that he wanted to stage a fake hold-up?

A. Please ask me that question again.

Q. When he told you in Los Angeles, before you went down to Calexico, that he intended to stage a fake hold-up, you told him you didn't want to do it, didn't you?

A. I don't remember what I told him.

Q. Did you say anything?

A. I probably did, Mr. Penney, but—

(Testimony of Elizabeth J. Williams)

Q. Just answer my questions. If you don't remember, just say so. What else was done before you went down to Calexico, in regard to this hold-up?

A. We went to a Chinese store.

Q. When?

A. Probably on the 29th, the day before we went down, or the 28th; I don't remember; it was a day or two before we went down. It probably was the day before we went down. And we bought a stone about the size of my three-carat stone, and I put it on my finger. [203]

Q. You don't mean a stone—you mean a ring, don't you?

A. I mean a ring—a stone about the size of my three-carat stone in my engagement ring.

Q. And that was the only piece of jewelry you had on your hand or arm when you went down to Calexico?

A. I had my wedding ring on.

Q. Your wedding ring? A. Yes.

Q. And this piece of glass? A. That is right.

Q. What, if anything, did Mr. Williams tell you about the ring that he purchased?

A. I went with him when he bought it.

Q. What did he say about it?

A. He had planned this thing, and we had talked it over, and I went—

Q. What did he tell you about the ring? That is what I am interested in now.

A. I had to have an engagement ring or some kind of a ring to wear, and it was almost the same size as my three-carat stone, because we had left the diamonds at the house; we did not take them.

Q. But what did Mr. Williams tell you in regard to this ring? A. I don't remember. [204]

(Testimony of Elizabeth J. Williams)

Q. Didn't he say anything to you?

A. He told me we were going down to buy it.

Q. When did he tell you that? That is what I am trying to find out.

A. I don't know the exact date, whether it was the day before we went or two days.

The Court: What did he say?

A. That we were going down to get a ring.

The Court: Is that all he said?

A. He asked me to go with him and told me why we were going.

The Court: What did he say?

A. That we were going down to get me a cheap ring to wear instead of my engagement ring.

Q. By Mr. Penney: What else did he say?

A. I don't recall.

Q. Did he come home from work some time and just say, "I want to go down and buy you a cheap ring"? Where did this conversation occur?

A. At home. He wasn't working at that time. He wasn't working. He didn't come home from work. He was at home all the time.

Q. Do you recall where you purchased that ring?

A. It was on the south side of Hollywood Boulevard. I don't remember what block. They had a display of cheap jewelry in the window. [205]

Q. Mrs. Williams, after the jewels were broken up, did you go down to San Diego with Mr. McAnally and Mr. Davis and meet Mr. Leitch, Art Leitch?

A. No, I didn't go down with Mr. Davis and Mr. McAnally. I went down, and Mr. Davis and Mr. McAnally brought me home.

(Testimony of Elizabeth J. Williams)

Q. You were in San Diego?

A. Yes, I had gone down the night before.

Q. And you were to meet Mr. Davis and Mr. McAnally by prearrangement, weren't you?

A. Yes, sir.

Q. Did you tell them where Mr. Leitch's place of business was? A. Yes, sir.

Q. Had you seen Mr. Leitch from the time that the jewelry was broken up until you went to San Diego?

A. No, I hadn't.

Q. Did you know whether or not he was in the same place of business, when you went down?

A. No, I didn't know.

Q. Did you contact him in any way, by phone or otherwise?

A. I stayed all night with his sister Saturday night, and I saw him Sunday morning.

Q. Was that the first time you had seen Mr. Leitch from the time the jewelry was broken up until you went down [206] there to meet Mr. Davis and Mr. McAnally?

A. Yes, sir.

Q. And you met Mr. Leitch's sister; is that right?

A. Yes.

Q. Did Mr. Leitch have his place of business at the same address that it was when the jewelry was broken up?

A. Yes, sir.

Q. Where did you make arrangements to meet Mr. Davis and Mr. McAnally?

A. When Mr. Leitch broke up the diamonds his laboratory was on University Avenue up there, and later he bought a house just behind this same building on the alley, and that was where—that is where his laboratory is now and was when Mr. Davis and Mr. McAnally came down.

(Testimony of Elizabeth J. Williams)

Q. But you told Mr. Leitch, did you not, that Mr. Davis and Mr. McAnally were coming down?

A. Yes, sir.

Q. And you told Mr. Leitch that they were coming down to discuss the breaking up of some jewelry, didn't you? A. No, I didn't.

Q. What did you tell Mr. Leitch?

A. I asked Mr. Leitch if he remembered breaking them up, and he said yes, and I said there were two men coming down to discuss it with him.

Q. And what date was that, if you can tell me?

A. I don't know. I don't know what date it was. [207]

Q. Then the following day you met Mr. Davis and Mr. McAnally, didn't you? A. At Mr. Leitch's?

Q. Yes.

A. No, not at his laboratory, because his laboratory was on University Avenue at the time he broke the diamonds up, and later it was in the alley, and the only address I had to give Mr. Davis and Mr. McAnally was the University address, and I waited for them on University Avenue.

Q. And then the three of you went to Mr. Leitch's?

A. Then we walked down to his laboratory.

Q. And there Mr. Davis and Mr. McAnally and you and Mr. Leitch discussed the matter of the breaking up of the jewelry, didn't you?

A. Well, Mr. Davis asked him if he did, and he said yes, he did.

Mr. Davis: I object to this as incompetent, irrelevant and immaterial, occurring long after the transaction and investigation took place, and it doesn't prove or tend to prove any issue in the case.

(Testimony of Elizabeth J. Williams)

The Court: It shows bias and prejudice.

Mr. Penney: I will come to the point right away, counsel.

Q. Turn to page 31, line 23, and the answer on line 25. Will you read that, please? A. Yes. [208]

Q. I will ask you if you made this answer to this interrogatory, at the time of your deposition, on the 10th day of December last:

"Q.—Did you ever discuss this matter with Mr. Leitch since he broke up the jewelry?"

And did you answer, "No, sir."

Mr. Davis: Now, Mr. Penney, I am going to call this to the court's attention. When you impeach a witness—Do you have this before you, your Honor?

The Court: No. Usually I do, but I haven't it now.

Mr. Davis: The witness' attention should be called to the context as well as the specific question. And I further object to it as not an impeaching question or contrary to any testimony given by her.

The Court: What line?

Mr. Penney: Line 23.

Mr. Davis: Your Honor, to get the import of the matter, the whole page from top to bottom should be read.

Mr. Penney: All right.

The Court: You may show it to the witness.

Q. By Mr. Penney: Mrs. Williams, you testified here that there never was a robbery in Calexico. I will ask you now to look at the question on page 26, line 23, and the answer on line 25 through line 1 of page 27.

The Witness: Shall I read the whole thing?

Mr. Penney: No; just line 1. [209]

(Testimony of Elizabeth J. Williams)

Mr. Taylor: What line are you referring to, Mr. Penney?

Mr. Penney: I am starting on page 26, at line 23, and the answer on line 25, which ends on line 1 of page 27. Have you read the question and the answer?

A. Yes, sir.

Q. Did you testify in that deposition, in response to this question, as follows?

Mr. Taylor: If your Honor please, I want to make an objection to merely picking out one question and one answer, because this particular matter goes over to page 27, and merely to take the answer at the bottom of page 26 and refer to page 27 is not a true indication of what the answer of the witness was.

The Court: I think you can take the witness on redirect, if you wish.

Q. By Mr. Penney: Was this question asked of you, and did you make this response:

"Q.—What did you state in Mr. Doyle's court, if you recall, in regard to these diamonds?"

"A.—They wanted me to return the three-carat stone, and I told them that was a stone that figured in the robbery, and that I could not return it."

Did you so testify? A. Yes.

The Court: Have you got the reporter in that divorce case here? [210]

Mr. Penney: Your Honor, I am going to make a statement in connection with that. I worked on that Saturday afternoon. There were two reporters there, and I have had a very difficult time getting that transcript. I have called at least a half a dozen times.

The Court: I would like to see the divorce file in this case. Do you have an order of the presiding judge?

(Testimony of Elizabeth J. Williams)

Mr. Bledsoe: Yes. I was making arrangements to have the man over at 10:00 o'clock tomorrow morning. If the court wishes him tonight—

The Court: It doesn't make any difference. If we finish tonight, all right. I am not going to stay here all night.

Mr. Penney: As an officer of this court, I think I should make a statement at this time. I went out Saturday afternoon and worked with the reporter on the transcript, and when I asked her the question Sunday morning I had a memorandum of what the reporter had told me she had testified to, and when I got the reporter late yesterday I was taken by surprise by what she told me, and that is why I haven't the reporter here this morning.

The Court: Well, we have experts who can read shorthand notes, if the shorthand notes are available.

Mr. Davis: I understand that.

The Court: You to not have the reporter present?

Mr. Penney: I do not have the reporter, no. [211]

The Court: What are the names of the reporters?

Mr. Penney: There was a man by the name of Barr, and Alfreda Noland, and she was the one who went over her notes with me on Saturday afternoon.

Mr. Davis: A statement was made the other day implying that Mrs. Williams had testified—

Mr. Penney: According to the notes that were read to me, that was the testimony.

The Court: Counsel can straighten that out. We will find out. Let us get some subpoenas out here. Do you want her subpoenaed as the plaintiff's witness or whose? I want the reporter here with his notes.

Mr. Penney: I can have her here tomorrow.

(Testimony of Elizabeth J. Williams)

The Court: Let us have her and the other reporter too.

Mr. Penney: Mr. Barr?

The Court: Barr.

Mr. Penney: I checked with Mr. Barr, your Honor. I can have all the notes here, if you want them.

The Court: I think they all ought to be here. Will you subpoena them?

Mr. Penney: I told both reporters to be here. I will have to get a subpoena duces tecum for them to bring in their notes.

The Court: All right. Do you have a description of the notes, the dates?

Mr. Penney: Yes, I think I can give that. [212]

The Court: All right.

Q. By Mr. Penney: Mrs. Williams, when you went down to San Diego in May or June, 1940, what was said prior to the time of your going there, by you and by Mr. Williams?

A. You mean about having the diamonds broken up?

Q. Yes. What did you say about going to San Diego, what did you say and what did he say?

A. He asked me if I thought Art could do it, and asked me what kind of wheels he had, emery wheels he had. He said he wanted them broken up, and he didn't know anyone to do it, and he asked me about Art, and I told him.

Q. Did you call Art Leitch up?

A. No. We just drove down.

Q. Did you go down the same day this discussion took place?

A. He called me from the office that morning and asked me if I could be ready to go down that afternoon.

(Testimony of Elizabeth J. Williams)

Q. What time did you leave here?

A. Oh, about 11:00 or 11:30.

Q. You went direct to Leitch's laboratory?

A. No; we stopped at the boat first.

Q. How long were you there at the boat?

A. Not so very long. I don't know how long we were at the boat, but not long.

Q. Half an hour? A. Approximately. [213]

Q. And what time did you arrive in San Diego?

A. I don't know what time we arrived, but we were at the laboratory—I was at the laboratory approximately two or two and a half hours.

Q. What, if anything, did you tell Mr. Leitch when you arrived?

A. I took the things up and asked him if he would unmount them.

Q. What else did you say?

A. I didn't say anything to Mr. Leitch.

The Court: Didn't you say anything at all?

A. Well, some conversation.

The Court: What was it?

A. I asked him if he would unmount them, and he said he would.

The Court: Didn't he ask you why?

A. No, I don't remember him asking me why.

The Court: Had he ever done anything like that for you before? A. No, sir.

The Court: Was he in the business of doing it for other people? A. Not that I know of.

Q. By Mr. Penney: And Mr. Williams was waiting down in the car; is that right?

A. That is right. [214]

(Testimony of Elizabeth J. Williams)

Q. Turn to page 8, line 17 of your deposition. I will start with the question on line 12 and finish through 18.

The Court: Do you have the correction?

Mr. Penney: I have seen the correction. I want to ask her if she so testified, or if that is just a correction, your Honor. Have you read it? A. Just a moment.

The Court: Have you read it? A. Yes.

Q. By Mr. Penney: Mrs. Williams, at the time of your deposition last Sunday, I will ask you if these questions were asked you, and if you made at that time these answers:

"Q.—That is, when you went down to Mr. Leitch's laboratory?

"A.—You mean was anything said to Mr. Leitch or—

"Q.—Well, there was Mr. and Mrs. Jones there?

"A.—Yes.

"Q.—Yourself and Mr. Williams and this other man?" And did you answer, "Yes"?

A. At the top of the page, Mr. Penney, you said "Mr. Williams I presume," and I didn't answer, if you will read up there.

Q. All right. I will ask you that.

A. All right.

Q. "And who else were present besides yourself and Mr. [215] Leitch, and I presume Mr. Sydney Williams?

"A.—Mr. Jones and Mrs. Jones.

"Q.—Who were they?

"A.—Let me see if I can recall the other name. There was another name, Mr. Jones worked for Mr. Leitch, and also this other man, but I do not recall his name right off-hand.

"Q.—What, if anything, was said at that time?

"A.—Well—"

(Testimony of Elizabeth J. Williams)

The Court: Have you shown her the correction?

Mr. Penney: She has it there.

The Court: You will have to use the deposition.

Mr. Penney: The court has that. I am sorry. I knew she had made the correction here.

The Witness: I made the correction.

Q. By Mr. Penney: Did you testify originally the way that it is in the record?

Mr. Davis: You mean as corrected? I object to attempting to impeach her by anything other than the deposition as corrected.

The Court: Is that your testimony, the way it is now corrected? A. Yes, sir.

Q. By Mr. Penney: Let us turn, then, to page 10, and start in on line 17 and go through line 22 or line 24.

A. Starting on what line, did you say—17?

Q. Line 12, and go through line 24. [216]

A. Yes, sir.

Q. Mrs. Williams, at the time of the deposition were these questions asked of you and did you make the following answers:

“Q.—And then what did you do after you arrived there in San Diego, and was it daytime or nighttime?

“A.—The early afternoon.

“Q.—Did you go directly to Leitch’s place?

“A.—Yes, sir.

“Q.—And were all of these parties there at Leitch’s when you got there?

“A.—No, this fellow that I cannot recall his name and Mr. Leitch, were not there at the time we arrived.”

The Witness: Were not there?

(Testimony of Elizabeth J. Williams)

Q. I beg your pardon. That is my error. I will read it again:

"A.—No, this fellow that I cannot recall his name and Mr. Leitch, were there at the time we arrived.

"Q.—All right. What was said at that meeting?

"A.—We just asked Art to break them up for us.

"Q.—Well, did you ask, or did Sydney ask?

"A.—I asked."

Did you so testify? A. I did ask.

Q. Mrs. Williams, after this jewelry was broken up and put in this hiding place, whether it was under a board [217] or in a box, was it all put in there together?

A. At that time, yes.

Q. Every bit of the jewelry that is involved in this litigation here was put there; is that right?

A. Yes, sir.

Q. And you were worried about it?

The Court: Did you understand the question?

A. All the jewelry that was in the robbery was put in the box.

The Court: Was put in the box after you came back from San Diego?

A. Yes, sir. The unmounted stones, the rings and the watch were put in the box.

Q. By Mr. Penney: All put in together?

A. Yes, sir.

Q. And remained there until when?

A. Not so long. He took the ring and the watch out.

Q. Mrs. Williams, you were worried about having these articles in your possession, weren't you?

A. Yes, I was.

Q. You didn't want to get in any trouble over it, did you? A. Naturally not.

(Testimony of Elizabeth J. Williams)

Q. And Mr. Williams had requested you to turn these articles over to him, hadn't he?

A. No, I don't think so. [218]

Q. Didn't he threaten to have you adjudicated insane if you didn't turn them over to him?

A. At that time— There was no fighting hardly at that time. It was later that he did that.

Q. When did the fighting take place?

A. After we—

The Court: You mean literally fighting?

Mr. Penney: Yes, your Honor, literally fighting. She has spoken about it. I just want her to fix the time for me when she and Sydney got to fighting.

The Court: When was this divorce suit filed—do you know?

Mr. Penney: May 8, 1939.

A. Not the divorce suit.

The Court: May 8, 1940?

A. No. That is when we separated. The divorce—

Mr. Penney: October 8, 1940. You separated May 8, 1940; is that right? A. That is right.

The Court: It was while you were living in this state of separation that you made the trip to San Diego?

A. On the 3rd day of May— May I explain it to you?

The Court: Your testimony indicated that.

A. Yes, that is right.

The Court: We don't want to take up too much time with something you haven't testified to. [219]

The Witness: When we hid the stones—after we left San Diego Sydney was very mad at me because I had bought—

(Testimony of Elizabeth J. Williams)

The Court: I wasn't talking about that. I was talking about whether it was in the period you were separated, after May 8th, that you went to San Diego.

A. Yes, sir.

The Court: You have testified that it was the latter part of May or early part of June, 1940, that you went to San Diego? A. That is right.

The Court: You testified yesterday that you had been separated and that he was living in an apartment, and he called you up and drove out to the house?

A. Yes, sir.

The Court: And when he came back from San Diego he continued to live separate and apart from you, did he?

A. He moved out of the house the 8th of May, and we went to San Diego maybe two weeks later. There had been no discussion about dividing the property.

Q. By Mr. Penney: When was it that Mr. Williams threatened to have you adjudged insane if you didn't return the jewelry?

A. After I came back from the east.

Q. When was that?

A. I was gone all of July, the month of July, and he had moved back into the house while I was gone and he lived [220] there while I was away.

Q. When did you return?

A. The last part of July.

Q. What did Mr. Williams tell you about returning these jewels to him?

A. Not at that time, but it was later, that if I didn't turn them over to him he was going to have me adjudged insane.

The Court: When was that? That is what counsel wants to know. A. When was that?

(Testimony of Elizabeth J. Williams)

The Court: When did he tell you that, about when?

A. Sometime in August, I believe.

The Court: Was it shortly before the divorce suit was filed?

A. No; it was quite a while before the divorce suit was filed; I should say in August, as near as I can remember.

The Court: You took the ring and watch with you?

A. No, I didn't. I put them up in the maid's room.

The Court: While you were in the east?

A. After I came back.

Q. By Mr. Penney: On your return Mr. Williams told you he wanted these things, did he?

A. Not right away, Mr. Penney.

The Court: Which things?

Mr. Penney: I am speaking now about the jewels involved [221] in this alleged robbery.

The Court: You mean the unmounted stones?

Mr. Penney: That is right.

A. Not right away.

Q. By Mr. Penney: How soon after your return was it that he made a demand on you for them?

A. The latter part of August or the first of September.

Q. Did he call you up?

A. No; he came up to the house. He was at the house very often, Mr. Penney.

The Court: When you came back from the east, you moved in and he moved out?

A. He moved out again.

The Court: Right away?

A. Yes. And he came back home and stayed ten days, and then he moved in and out of the house all the time.

(Testimony of Elizabeth J. Williams)

Q. By Mr. Penney: When was the last time you saw these unmounted stones?

A. Can you tell me when the concerts are in the bowl? Well, I went to the bowl one night with our neighbors, and I don't know what month or what day it was, but I know it was in August or September.

Q. And upon your return to your home that night did you notice anything unusual? A. Yes, I did.

Q. What did you notice? [222]

A. The door from the back room into the dressing room had been cut open; the panel in the middle of the door had been sawed open.

Q. Then what did you do, when you saw that the panel had been sawed open?

A. I looked around the house to see if there was anything missing.

Q. Did you find anything missing?

A. Just the diamonds.

Q. Which diamonds?

A. The diamonds we had broken up in San Diego.

Q. Mr. Williams had a key to the house, didn't he?

A. Yes, and I had locked the door between the bathroom and the dressing room.

The Court: Did he have that key? A. No, sir.

The Court: Did you report that to the police?

A. No, I didn't, because there wasn't anything else gone.

Q. By Mr. Penney: Mrs. Williams, when you returned from Calexico on the first day of January, 1940, did you go over to the home of Mr. and Mrs. Conrad Lewbel?

A. No, we didn't. We went to see them, and they weren't home; they were over at some friend's across the street from the apartment.

(Testimony of Elizabeth J. Williams)

Q. Did you see them over there? [223]

A. Yes, sir.

Q. Did you tell Mr. and Mrs. Conrad Lewbel on that occasion, in substance or effect, that you and Sydney had been robbed of your jewelry while in Calexico?

A. It was Mr. Williams. He told the story to them.

Q. Do you recall a conversation with Mrs. Lewbel in which she asked you about your fur coat, and you stated, in substance or effect, that they didn't want that, because it would be hard to dispose of?

A. No, I don't remember. I was wearing my new coat, and they didn't take it.

Mr. Penney: May I have that last answer read, please?

(Answer read by the reporter.)

The Witness: My mink coat.

Mr. Penney: That is all.

Cross-Examination

Q. By Mr. Davis: What do you mean by "they"?

A. I mean he reported the robbery, and naturally he explained to Mr. and Mrs. Lewbel that they didn't take my coat, because it would probably be hard to dispose of. He did the explaining.

Mr. Davis: That is all.

The Court: We will have a short recess.

(Short recess.)

Mr. Penney: Your Honor, I have one more question to ask the witness. [224]

The Court: Yes.

Q. By Mr. Penney: Mrs. Williams, in the fall of 1941, and during the progress of your divorce litigation with Mr. Williams, did you call him by phone and tell

(Testimony of Elizabeth J. Williams)

him, in substance or effect, that if he didn't give you certain bonds and stock by way of a property settlement agreement, that you were going to accuse him of presenting a false claim against the insurance company on this robbery?

A. I did not.

* * * * *

Recross-Examination

Q. By Mr. Davis: Mrs. Williams, at that time you realized that you also had presented a false claim to the insurance company?

A. Yes, sir, I realized that.

Q. And for that reason you disclosed this matter to your attorney?

A. Yes, sir.

Q. And, through him, to the insurance company?

A. Yes, sir.

Q. Mrs. Williams, during the course of this conspiracy, I will call it, or this transaction that you and Sydney [225] Williams had, and up to the time you last saw these uncut diamonds, did you disclose the fact that you or Syd had these uncut diamonds, to anybody, any friend or relative?

A. Yes. I showed them to Mrs. Berrenberg.

Q. Who was Mrs. Berrenberg?

The Court: That was gone into yesterday.

Mr. Davis: I had forgotten.

Q. By Mr. Davis: Directing your attention particularly, did you write or tell your mother that you had these jewels?

Mr. Penney: To which I object as a self-serving declaration.

Mr. Davis: This is cross-examination.

The Court: Overruled. Read the question.

(Testimony of Elizabeth J. Williams)

(Question read by the reporter.)

A. I wrote my mother a letter from the east.

Q. What is your mother's name?

A. Mrs. Ida Horsman.

Q. She was in Los Angeles?

A. Yes, but she doesn't know anything about this.

Q. Do you know whether she received the letter or not? A. Yes, I know she received it.

Q. I hand you a letter, and let me ask you what it is, and then I will show it to Mr. Taylor. This is a letter which you and Mr. Taylor handed to me. I will ask you if that is the envelope in which you addressed the letter to your mother? [226] A. Yes, sir.

Q. Will you look at the contents and see if that is the contents of the letter you wrote to your mother?

A. Yes, it is.

Q. And, without stating the contents, say what was in the letter when you sent it to your mother, or in the envelope when you sent it to your mother.

A. That was the letter I wrote to my mother, and this is my will.

Q. There are two sheets to the letter here?

A. Yes. And this is an envelope that I put inside of that one.

Q. They were both in the same container?

A. Yes.

Q. Where did you get this letter before you gave it to Mr. Taylor? A. From my mother.

Q. From your mother? A. Yes, sir.

The Court: That will be marked for identification. What is the next number, Mr. Clerk?

The Clerk: No. 10.

(Testimony of Elizabeth J. Williams)

The Court: It will be so marked.

Mr. Penney: Are you going to introduce the will?

Mr. Davis: She said they were both enclosed in the envelope. [227]

Q. By Mr. Davis: Mrs. Williams, this letter is post-marked "Elkton, Maryland, July 5, 1940. The letter is headed Elkton, Maryland, July 4, 1940.

Your Honor, the letter is apparently— Is there anything in there except the last part that is—

Mr. Penney: I don't think it is material.

The Court: Nothing in the letter at all? Are you offering the letter in evidence?

Mr. Davis: I will offer them all in evidence.

The Court: And you object as immaterial?

Mr. Penney: That is right.

The Court: Objection overruled.

Mr. Davis: I will just read the letter. It may save a little time.

The Court: I am going to read it.

Mr. Davis: You will read it anyway?

The Court: Yes.

Mr. Davis: May I read one paragraph here and tell counsel that that is what I am offering?

The Court: All right.

Mr. Davis: This letter is addressed to "Dearest Mother & All," and is signed, "Love, Betty." The last paragraph says: "Will write tomorrow. Mama I am putting an envelope in to you, not to be opened unless something happens to me & it won't, so don't worry. Love, Betty."

I will hand this to the clerk. [228]

Enclosed in the letter is an envelope superscribed, "My last will. Not to be opened only in case of death. Eliza-

(Testimony of Elizabeth J. Williams)

beth J Williams." And in this envelope is a will, which I would like to read. It is dated Elkton Md July 4 1940

"My last will

I bequeath to my mother Ida Horsman, 836 W 53rd St Los Angeles Calif.

My insurance Policies (2)

1—3 carat unset diamond

1 (it looks like "2½" and the "½" scratched out) "c diamond. Diamond cigarette case 1 diamond watch 1—1 carat ring set in white gold. about 50 unset diamonds (small)

1 mink coat 1 *carcual* coat.

2 silver foxes. All of my *cloths* 12 service plates. Every thing that is personally mine small things.

To my husband Sydney M Williams the stocks that we have All of the furniture. our cars and the house which is to be sold at once. I want him to turn over to my mother \$5,000 in cash. The house is in Sydney and Elizabeth Williams name. After the \$5,000 he is to have the remainder. Mr. Williams is an attorney I want my mother also to have an attorney.

I want my mother to spend all the money she needs too. And also I want her to buy a home for herself and my sister [229] & brother in law Mr and Mrs L A Ellis

After my mother's death I want my sister Mrs L A Ellis to have the handling of the money for my niece Patricia D. Morrow At no time is my *sister* Mrs Fred Morrow to have any of the money. I want Patricia put in Private School, and I want my sister Mrs Ellis to see that she is and that she is to be clothed under her supervision. My sister and brother in law Mr & Mrs Ellis after my mother's death are to live in the house rent free

(Testimony of Elizabeth J. Williams)

until Patricia is in need of the money for her education, then sell the house and put the money in trust for Patricia. I want above every thing for her to go to Private School, and she must finish college other wise Lora is to have what is left. I want Patricia to have the advantage that I never had.

To my brothers and sisters I leave my wish for their happiness.

My diamonds are to be sold and that money used only by my mother if Mrs Ellis thinks it wise she must have a bank handle the money for Patricia.

This I insist on, mother to buy a home furnish it lovely and spend all she wants not to skimp on any thing because I believe she will receive enough on my fur & diamonds and the other money to be comfortable and she is not to loan money to any one other than in case of illness.

My husband may be very bitter about the \$5,000 in cash from the sale of the house but I have helped him work and [230] have tried to be a devoted wife

Signed

Elizabeth J Williams".

Q. By Mr. Davis: Now, Mrs. Williams, this will was written by you, in your handwriting? A. Yes, sir.

Q. On the date it bears, July 4, 1940?

A. Yes, sir.

Q. You refer here to 1 3-carat uncut diamond—unset diamond. What diamond was that?

A. It was my engagement ring.

Q. No—1 3-carat unset diamond.

A. It was my engagement ring, that Art had taken out of it.

(Testimony of Elizabeth J. Williams)

Q. It was the diamond that came out of the engagement ring? A. Yes, sir.

Q. What was this other one, 2-carat diamond?

A. I suppose I meant Syd's 2-carat stone.

Q. That was the stone that came out of Syd's ring?

A. Yes, sir.

Q. And the cigarette case was the one you testified concerning here? A. Yes, sir.

Q. In this court here? A. Yes, sir. [231]

Q. And the diamond watch, is that the watch you testified about here? A. Yes, sir.

Q. And is that the diamond watch that has been introduced in evidence? A. It is.

Q. And the 1-carat ring, is that a ring you have been testifying about here? A. Yes, sir.

Q. The one that has been introduced in evidence?

A. Yes, sir.

Q. Item No. 3? A. Yes, sir.

Q. When did your mother give you this letter and the will back? A. This morning.

Q. And at the time she gave it back to you was this envelope which contained the will sealed?

A. No. She had opened it, because she was so worried about me; she had opened it.

Q. Is your mother available?

A. She is very ill, Mr. Davis; my mother is very ill.

The Court: How old is she?

A. She is 74, but she just had a stroke.

Mr. Davis: I will offer these documents in evidence, your Honor. [232]

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 10.

The Court: Is that all?

(Testimony of Elizabeth J. Williams)

Mr. Davis: That is all with this witness.

The Court: How did you happen to go on this trip?

A. My girl friend was going, and she wanted me to go along, and I was so nervous and I had been ill.

The Court: Did you discuss it with Mr. Williams?

A. Yes, sir.

The Court: Did he provide the money for you to go on the trip? A. He gave me the money.

The Court: Did you drive?

A. Yes, in an Austin car.

The Court: Both there and back? A. Yes, sir.

The Court: Do you know when Mr. Williams got the money from the insurance company?

A. I believe it was in March.

The Court: That was before you separated?

A. Yes, sir.

The Court: Did he tell you when he got it?

A. I knew, because—

The Court: Did he tell you? A. Yes.

The Court: You signed the check? [233]

A. Yes, I signed the check.

The Court: The check was made out to both you and him? A. Yes, sir.

The Court: And you signed the checks and handed them over to him? A. Yes.

The Court: In the meantime, you got the house or your living expenses? A. Not after we separated.

The Court: Until you separated? A. Yes, sir.

The Court: He did not provide any expenses for you after May 8, 1940? A. No, sir.

The Court: Did you have any money in your purse on the night of this supposed or alleged hold-up?

A. No, not that I recollect.

(Testimony of Elizabeth J. Williams)

The Court: Did you have any money at all in your purse? A. I don't think I did.

The Court: Did you have a purse?

A. Yes, I had a purse.

The Court: Where were you carrying it?

A. Under my arm.

The Court: Under your arm? A. Yes.

The Court: What kind of a purse was it? [234]

A. I don't remember which bag I carried.

The Court: Was it a big one or a little one?

A. I always had a large one.

The Court: What did you have in it?

A. You know, just—

The Court: Did you have a coin purse?

A. Yes.

The Court: How much money was in it?

A. Very little. I don't remember how much, because I never carried very much money.

The Court: How much money do you usually carry?

A. Three or four dollars.

The Court: Three or four dollars? A. Yes.

The Court: When you reported the hold-up, or when the hold-up was reported to Mrs. Brown and Mr. Brown, did either one of them ask you whether or not the men did ask for your money?

A. No; I don't remember.

The Court: Did the policemen at Calexico ask you whether or not they had taken your money?

A. No.

The Court: Or asked for your money?

A. No, sir.

The Court: Or looked in your purse?

A. No.

(Testimony of Elizabeth J. Williams)

The Court: Did the insurance company man you talked to, Reynolds? A. No.

The Court: Did you ever talk to anybody from the insurance company about this hold-up? A. No.

The Court: Did anybody ask you, up until this moment, concerning what you had in your purse, or whether or not, in this alleged hold-up, somebody demanded your purse? A. I don't recall anyone asking me that.

The Court: All right.

Redirect Examination

Q. By Mr. Penney: One question. The lady you went back on this trip with was Art Leitch's sister?

A. Yes, sir.

Q. Mrs. Williams, you have listed certain stocks and diamonds in this will. Now, when you prepared your cross-complaint in the action brought by Mr. Williams against you for divorce, did you list any diamonds in that cross-complaint?

Mr. Davis: I object to that as not the best evidence.

The Court: We are going to have those here, and I think we had better wait until we get the files over here, because, the more we talk about them this way the more confused we will be.

Mr. Penney: I was only asking for her recollection.

[236]

The Court: Go ahead, then. For the purpose of testing her recollection, the question is proper.

The Witness: Will you ask the question again?

The Court: The reporter will read it.

(Question read by the reporter.)

Q. By Mr. Penney: As community property?

A. I don't remember.

(Testimony of Elizabeth J. Williams)

Recross-Examination

Q. By Mr. Davis: I did want to ask a question or two, but Mr. Penney intervened, going on the theory that there wasn't any robbery. I didn't ask it, and I would like to ask her about her purse.

Where was your cigarette case?

A. In my coat pocket.

Q. You had that with you in Calexico on the night when you walked over to the Browns?

A. Yes; I believe it was in my coat pocket.

The Court: Was that taken? A. No.

The Court: Or was that reported as having been taken? A. Yes.

The Court: Was there any report made that they asked you to go through your pockets and see if you had anything in them? A. I don't recall.

Mr. Davis: It wasn't insured. If the court please, I [237] didn't offer these earlier, but it might help.

Mr. Penney: No objection to the introduction.

Mr. Davis: I have photostatic copies, to show—

The Court: They are admitted as Exhibit No. 11.

Mr. Davis: Those are the photostatic copies of the two drafts in payment of this loss.

The Court: And it is stipulated that whatever names appear on the back were endorsed by the persons who purport to have made them, and on or about or before the date the checks were paid?

Mr. Davis: Yes. The drafts themselves will show the dates they were paid.

The Court: When you got back from South Carolina, or whatever it was, in the east, wherever you were, when you got back to Los Angeles Mr. Williams was living in the house? A. Yes, sir.

(Testimony of Elizabeth J. Williams)

The Court: How many days did he continue to live in the house after you returned?

A. He moved out that night.

The Court: Did you ask him if the green box was still there? A. No.

The Court: Did he say anything about it?

A. No, it was never mentioned.

The Court: Did you go up to see if it was still there?

A. No, I didn't. I don't remember if I did or not.

[238]

The Court: When did you first have any curiosity to see if it was still there, after he had been in the house for these several months that you had been separated?

A. Soon after I came back.

The Court: Was that the occasion when you showed them to Mrs. Berrenberg?

A. No; it was before that.

The Court: You went and got the box and showed them to her? A. Yes, sir.

The Court: It isn't clear in my mind when you took out the watch and the ring.

A. Right after I came back from San Diego.

The Court: And you left them in the dressing room when you were east? A. In the bedroom.

The Court: You left those in the maid's room, in the bedroom? A. Yes, sir.

The Court: I don't understand.

A. The maid has a living room and a bedroom and bath, and I put it under the maid's bed. I took the diamond watch and ring and put them under the maid's bed.

The Court: Did you have a maid?

A. Not at that time.

(Testimony of Elizabeth J. Williams)

The Court: You just put them loose under the head of the [239] bed or on the floor under the bed?

A. The bed was just the size of the rollers from the floor, and I put them down in the corner of the bedstead. It was all just bedstead.

The Court: The corners were hollow?

A. No. I guess it was the corner.

The Court: You put that under the mattress there, or the box spring, or whatever it was? A. Yes, sir.

The Court: Down in the corner? A. Yes, sir.

The Court: Which corner?

A. Well, it was, I think—

The Court: The upper corner or the lower corner?

A. There was only one bedstead. There wasn't—

The Court: I am talking about the corner of the bed now. Which corner of the bed did you put them under?

A. The head of the bed.

The Court: Which one—right or left?

A. The bed was like your desk here, and I put it over on that corner.

The Court: Looking toward the head of the bed, you put it under the lefthand corner of the bed?

A. Yes, sir.

The Court: Did you tell your husband they were there? A. No. [240]

The Court: Did you tell anybody they were there?

A. No, sir.

The Court: Did he have anybody occupying those premises while you were gone, or do you know?

A. No, he didn't have, not that I know of.

Q. By Mr. Penney: When you returned, when did you go to look if they were there?

A. The following day.

(Testimony of Elizabeth J. Williams)

Q. And they were there? A. Yes, sir.

Q. And that was the day that you looked to see if the unmounted stones were in the box? A. Yes, sir.

Q. When was it that you showed these to Mrs. Berrenberg—shortly after you got back?

A. Yes. She was over to spend a week-end with me.

Q. How did the subject happen to come up?

A. I was ill in those days, and things had been going on, and I was so nervous, and I was afraid of Syd.

The Court: How did you happen to get on the subject?

A. I just showed them to her.

The Court: You went and got the box out of the attic? A. Yes.

The Court: Did you show her where they were?

A. No, I didn't.

The Court: Did you tell her then that there had been a [241] fake hold-up? A. No.

The Court: What did you tell her?

A. I just showed her the unmounted diamonds.

The Court: What did you tell her about it?

A. I told her something happened. I don't know what I told her.

The Court: Did you tell her they were yours or Mr. Williams'?

A. No. She knew there had been a robbery. It was in the paper, and we just mentioned it. I hadn't told her it was a fake hold-up.

The Court: How long was that before you found the panel of the door cut out? A. Possibly three weeks.

The Court: Was anybody in the house that night when you found the panel cut out?

(Testimony of Elizabeth J. Williams)

A. I don't remember. Mr. and Mrs. Carr from next door, I don't remember whether I went out and told them—I don't remember whether they came up to my bedroom or not.

The Court: Did you tell them? A. Yes.

The Court: Did you tell them that night?

A. Yes, I did. [242]

* * * * *

SYDNEY M. WILLIAMS,

heretofore duly sworn, upon being recalled, testified as follows:

The Court: Mr. Williams, you reported that \$96 had been stolen from you? A. Yes, sir.

The Court: How do you know it was \$96?

A. We had been to dinner just prior to that with the Browns, and I knew approximately how much money I had at the time. I said that was approximately it.

The Court: How much money did you take down with you?

A. I don't remember that—probably around \$150.

The Court: You had a pretty good idea at the time you made the claim how much money you had, didn't you?

A. Yes. I told them that, to the best of my recollection, it was \$96.

The Court: You didn't say that it was absolutely \$96?

A. No. It didn't matter, under the policy, anyway, because there was a \$250 limit, and the claim was much more than the \$250. That was under the floater policy.

The Court: Did you report to the Browns that they [243] relieved you of \$96?

(Testimony of Sydney M. Williams)

A. Yes, and also to the police department.

The Court: Did you tell them the denominations of the money? A. No.

The Court: You didn't? A. No.

The Court: What was it—\$100 bills, \$10 bills, \$50 bills, or \$20 bills?

A. I couldn't tell you what I had in my pocket, the denominations.

The Court: You know about how much money you have got in your pocket, roughly, don't you?

A. Well, I don't know.

The Court: Well, I just want to know.

A. I am not confident of it, no.

The Court: How much money did you spend for dinner that night? Did you pay the check?

A. Yes, I believe I did. It was not one of those very good places.

The Court: How much was it?

A. I don't remember. It has been so long ago.

The Court: Was it as much as \$100?

A. Oh, Lord, no. It couldn't have been over \$10 or \$12.

The Court: For the four of you? [244]

A. Yes.

The Court: Now, what did you tell the police about your wife's purse?

A. She didn't have a purse with her. She had her make-up in the pocket of her coat and didn't have a purse.

The Court: When these people held her up did they go through her pockets?

A. No. She didn't have her cigarette case, either, because when we got back to the hotel it was laying there.

(Testimony of Sydney M. Williams)

and Mrs. Brown said, "It is a good thing you didn't have your cigarette case with you."

The Court: Did they say anything to her about shelling out or giving them any money, or anything of that kind?

A. The very first thing, when this fellow said, "Don't get excited. Nobody is going to get hurt; all we want is your money and jewelry," she said, "Honey, don't argue with them."

The Court: Did you have your wallet in your hip pocket? A. Yes.

The Court: Did they take it out of your pocket?

A. No.

The Court: They let you reach for your hip pocket?

A. Yes, sir.

The Court: Did he have a gun?

A. The thin-faced fellow?

The Court: The fellow with the gun? [245]

A. Right in front of me, like this, and I reached in and handed it to him, and he looked at it quickly, and said, "Is that all the money you have got?" and I said it was.

The Court: Was this an old man?

A. No. I would judge they were 26 or 25 years old.

The Court: And one of them was a Mexican?

A. A Mexican, and the one with the full face was a white fellow.

The Court: The Mexican is the one who told you to hand over your jewels and money?

A. He did the talking.

The Court: I have no other questions.

(Testimony of Sydney M. Williams)

Cross-Examination

Q. By Mr. Davis: How was Mrs. Williams dressed that night?

A. She had on a mink coat and a black dress.

Q. She wasn't dressed in slacks?

A. No, not that night.

Q. At the time of the hold-up she wasn't dressed in slacks? A. Oh, no.

Q. Did you tell Mr. Reynolds at the time you made the report that she was dressed in slacks?

A. Not at the time of the hold-up.

Q. You didn't tell him that?

A. She was dressed in slacks when we went down.

[246]

The Court: Had she left her purse in the room?

A. I don't remember whether she had a purse with her. She very seldom would carry a purse when we would go out. She would put her make-up in the pocket of her mink coat.

The Court: Her combs and hairpins?

A. She would carry her lipstick and her powder case, compact.

Q. By Mr. Davis: What did he do about the wedding ring? A. What did who do about it?

Q. The robber?

A. This Mexican fellow asked her for it, and she said, "You have got everything you want, and I am going to keep this. You are going to have trouble if you try to take that off of me." And he said, "O. K., lady; keep it."

Q. Didn't she take it off?

A. No. And then he said, "Don't move for five minutes. If you do we will come back and get you."

(Testimony of Sydney M. Williams)

Q. She was pretty self-possessed that night?

A. Yes, sir.

Q. She wasn't excited at all? A. No.

The Court: Was she an excitable person?

A. No. If she gets angry, she is, but she throws things at you, tries to knife you or shoot you, and things like that. She has a violent temper. She has hit me over the head and split my scalp open, and cut my hands all up with [247] knives. And when I took my mother to try and get some clothes, she tried to brain my mother with an iron. She gets very violent.

Q. By Mr. Davis: What kind of a purse did she take to Calexico with her?

A. I don't remember any kind of a purse she took. I have no recollection of it. Probably it was a black purse, if she took any.

Q. You don't remember her taking any purse to Calexico?

A. I have no recollection of it one way or the other, sir.

Q. Didn't you tell Mr. Reynolds that she wore her diamond ring and the bracelet and that the watch was in her purse? A. I did not, sir.

Q. The day before, on the 30th? A. No, sir.

Q. You didn't make any such statement?

A. No, sir, because she wore all of it down there.

Q. Mr. Williams, at the time you made the report to Mr. Reynolds on the 2nd of January, 1940, you saw him regarding the information then, after you gave it to him, did you not? A. Yes.

Mr. Davis: I think that is all. [248]

(Testimony of Sydney M. Williams)

Redirect Examination

Q. By Mr. Penney: I have one question. Mr. Williams, in the fall of 1941, during the progress of this divorce action, did Mrs. Williams call you by telephone and tell you, in substance or effect, that if you didn't give her certain stocks and bonds and other property, that she was going to accuse you of collecting some money from the insurance company on an alleged fake hold-up?

Mr. Davis: I object to that as incompetent, irrelevant and immaterial, and not binding on the plaintiff. What passed between them might have been material as against them, but it would be self-serving as to the plaintiff.

The Court: The question is proper. The objection is overruled. Well, it is sustained, as far as the plaintiff is concerned, but overruled as far as the other defendant is concerned.

Q. By Mr. Penney: Yes or no.

A. Yes, she did make such a phone call.

Q. After she made that phone call, what, if anything, did you do in regard to imparting that information to the plaintiff company?

A. I immediately called Mr. Lewbel and instructed him to give that information to the insurance company.

Mr. Penney: That is all.

Recross-Examination

Q. By Mr. Davis: Mr. Lewbel was not the representative [249] of the insurance company, was he? He was a friend of yours?

A. Yes, but he represents all of the insurance companies.

Mr. Davis: I move to strike that.

(Testimony of Sydney M. Williams)

The Court: It may be stricken.

Q. By Mr. Davis: He is not a representative of the Continental Insurance Company, is he, and you knew it?

A. No, I don't know it. He represented the Continental many times, to the best of my knowledge.

Q. What do you know about him representing the Continental?

A. I couldn't give you any names, Mr. Davis. You probably could do that better than I could.

Mr. Davis: I move to strike that.

The Court: It may be stricken.

Q. By Mr. Davis: Do you know of any case in which he represented the Continental? A. No, I don't.

[250]

* * * * *

BARBARA LEWBEL,

called as a witness in behalf of the defendant Sydney M. Williams, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Barbara Lewbel.

The Clerk: Where do you reside?

A. 938 South Hobart Boulevard, Los Angeles.

Direct Examination

Q. By Mr. Penney: Mrs. Lewbel, you know Sydney Williams and Mrs. Williams? A. Yes, sir.

Q. Did you have occasion to see them on the first day of January, 1940? A. I did.

Q. Where did you see them at that time?

A. At my home.

(Testimony of Barbara Lewbel)

Q. Did you have any conversation with Mrs. Williams in regard to a hold-up in Calexico the day before?

A. I did.

Q. Did she tell you, in substance or effect, that there had been a hold-up in Calexico, in which their diamonds and jewelry had been taken? A. She did.

Q. Did you have a conversation with her in regard to a mink coat she was wearing? A. Yes, I did. [251]

Q. Did you tell her, in substance or effect, that it was a fine thing they hadn't taken the coat, and did she tell you, in substance or effect, that the coat would have been hard to dispose of after the hold-up and that was the reason they didn't take it?

A. That is just what she told me.

Mr. Penney: You may cross-examine.

Cross-Examination

Q. By Mr. Davis: What time of day was it that you saw them on January 1, 1940?

A. I would think the time of day was late afternoon. We were almost ready to leave the house and pay a New Year's Day call.

Q. Isn't it a fact that you were visiting across the street and they came over there?

A. No; I don't recall that.

Q. You wouldn't say that that wasn't true?

A. No. I think we were at home, preparing to leave.

Q. You wouldn't be sure that you might not have been across the street?

A. I would be reasonably sure we were at home.

Q. At any rate, both Mr. and Mrs. Williams told you about this robbery? A. That is right.

(Testimony of Conrad Lewbel)

Mr. Williams. Then I went on to Mr. Reynolds and reported it to Mr. [255] Reynolds, of Toplis & Harding.

Q. Do you recall about when it was that you made the report to Mr. Reynolds?

A. I told Mr. Reynolds of the conversation with Mr. Williams and Mrs. Williams, and I told Mr. Reynolds that, since the report had been furnished, that had been told to me, and I felt in duty bound to report it to him.

Mr. Penney: That is all.

Mr. Bledsoe: If the court please, our cross-examination of this witness will probably take some time, and I think we had better ask to have it go over.

The Court: Ten o'clock tomorrow morning, and Mr. Lewbel is instructed to return. You will have the County Clerk here; you will have him here at that time, and the two reporters. Recess until 10:00 o'clock.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., the following day, Thursday, December 14, 1944.) [256]

Los Angeles, California, Thursday, December 14, 1944; 10 A. M.

(Parties present as last noted.)

The Court: Continental against Williams.

The Clerk: I have the file from the Superior Court, from Judge Schmidt, your Honor. Shall I open it now? It was sent over from that court.

The Court: Yes. That may be opened now. Just a moment. Who brought the file?

Mr. Parker: I did.

The Court: All right. Swear the witness.

F. E. PARKER,

called as a witness in behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name.

A. F. E. Parker.

The Clerk: And your address?

A. 218 North Garfield Avenue, Monterey Park.

Q. What is your occupation?

A. Deputy county clerk.

The Court: Of the County of Los Angeles?

A. Yes, sir.

The Court: You are here in response to a subpoena issued by this court? A. Yes, sir. [257]

The Court: And you have brought with you certain documents and papers? A. Yes, sir.

The Court: As indicated in the subpoena?

A. Yes.

The Court: You have the file with you?

A. Yes, sir.

The Court: What is it?

A. It is the file in the case of Williams against Williams.

The Court: Does either one of you wish to cross-examine with reference to it?

Mr. Davis: No, your Honor.

Mr. Penney: No, your Honor.

The Court: You may remain in attendance. I understand it is necessary for you to remain until it is returned to you. This file will be received in that envelope and marked as Plaintiff's Exhibit No. 12 for identification. Do you wish to cross-examine?

Mr. Penney: No, your Honor. But it occurs to me that there was a case which followed this one, which is really a companion case of this one, No. 474,457.

The Court: Was that mentioned in the subpoena? Is that a sealed file?

Mr. Penney: It is not a sealed file, but we don't have it. [258]

The Court: Do you wish it?

Mr. Davis: We might just as well have it here, as long as it is a companion case of this one.

The Court: Have you got copies of the pleadings?

Mr. Davis: No, I don't have.

Mr. Taylor: If the court please, we have a copy of the complaint and a copy of the answer and a copy of the notice of entry of judgment, and a copy of the findings of fact and conclusions of law.

The Court: And of the judgment. Is there any property settlement agreement mentioned in that?

Mr. Taylor: No, your Honor.

The Court: Was it mentioned in this case? Do you have copies of the files?

Mr. Penney: He has sufficient of the pleadings here to satisfy us.

The Court: Very well, if counsel will be satisfied with Mr. Taylor's copies in place of the originals.

Mr. Davis: Mr. Taylor, was any testimony given in that case?

Mr. Taylor: Yes.

Mr. Davis: Can you mention the names of the witnesses who testified in that case? I am just wondering if it was reported.

Mr. Taylor: I don't recall whether there was a reporter or not. I believe Mr. Williams testified and Mr. [259] Lewbel testified.

The Court: When was it?

Mr. Taylor: May 26, 1942.

The Court: I think we had better have the reporter.

Mr. Bledsoe: They may not have had a reporter.

Mr. Davis: We are trying to find out what this is all about. We are trying to find out whether there was any testimony taken and if there was a reporter.

Mr. Taylor: There was testimony taken. I do not recall whether there was a reporter or not.

The Court: Were you present?

Mr. Taylor: Yes, your Honor.

The Court: Was there testimony?

Mr. Taylor: Yes

Mr. Bledsoe: There was a motion for continuance, because of the illness of the defendant, and that was denied.

Mr. Taylor: That is correct.

The Court: There was a default of the trial, then, actually?

Mr. Taylor: The case went to trial, and Mr. Williams put on testimony, and, according to my notes, also Mr. Lewbel testified. I believe those were the two witnesses who testified on behalf of Mr. Williams.

The Court: Was there any testimony there concerning the property or these diamonds, cut or uncut, or settings?

Mr. Taylor: There was testimony concerning the value of [260] certain items of personal property, including one diamond pin and one diamond ring.

The Court: There was testimony?

Mr. Taylor: Yes, sir.

The Court: Do you want to get the reporter, or get the official file here or not?

Mr. Davis: I believe we ought to do that. We will check that file and see if there was a reporter.

The Court: Very well. While Mr. Parker is here the clerk can draw up another subpoena duces tecum, and we can issue it and serve it now, and he can go over and get the file and bring it back.

Mr. Davis: I think that would be a good thing.

The Court: The clerk will issue a subpoena and serve it. What was the number of that?

Mr. Taylor: 474,457.

The Court: If we get the minutes here, we can find out whether there was a reporter in attendance.

Mr. Taylor: I have a copy of the pleadings.

The Court: That is up to counsel. Does anybody wish to do anything with the files that have been marked for identification as Plaintiff's Exhibit No. 12? They are still sealed.

Mr. Davis: Perhaps at the recess we could go through them.

The Court: Do you want to offer them in evidence?

[261]

Mr. Davis: Well, I have no objection to that.

The Court: But you don't know what they are?

Mr. Davis: I don't know what is material or what isn't material. I don't want to encumber the record too much.

The Court: Are you offering them in evidence?

Mr. Davis: I don't know, your Honor, until—

The Court: I am not going to look at them until somebody makes some move.

Mr. Davis: Very well.

The Court: I can't rule on whether they are material or immaterial until somebody makes a move to offer them in evidence. Otherwise I will be taking evidence de hors the record.

Mr. Davis: I don't know anything about these files.

The Court: The file is here, if somebody wants to offer it in evidence.

Mr. Davis: I don't know what is in there. I suppose that is the only way to get it.

Mr. Penney: Your Honor, I offer in evidence at this time the complaint, the cross-complaint, the findings of fact and the judgment.

Mr. Bledsoe: We will offer the balance of the file, by reference, of course.

The Court: Very well. The file is now open for both of you to look at it and determine whether or not you want to make any objection. [262]

Mr. Penney: I have no objection.

The Court: You may examine the file, to see if you want to make any objection. Do you wish to look at this?

Mr. Bledsoe: Yes, your Honor. If the court please, Mr. Lippett appraised these jewels, and he asked me if he could come down here at this time, and Mr. Penney has no objection.

The Court: All right. Put him on the stand.

EMANUEL M. LIPPETT,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Emanuel M. Lippett.

The Clerk: And you address?

A. 739 South Ogden Drive.

Direct Examination.

Q. By Mr. Bledsoe: Mr. Lippett, you are engaged in the jewelry business? A. I am.

Q. And you were during the year 1939?

A. I was.

Q. And you did, during the year 1939, did you, appraise certain jewelry for Mr. Williams?

A. I did. [263]

Q. For the purpose of ascertaining its value?

A. Yes.

Q. You do not have a copy of your appraisal?

A. I do not.

Q. And without the copy of the appraisal or the original, you can't be certain about any of the articles?

A. I cannot.

Q. You do remember making the appraisal?

A. I do.

Q. Did you make the appraisal on the actual retail value or on the import value?

A. May I enlarge a little on the question?

Q. You can answer it.

The Court: Can you answer it yes or no?

The Witness: Will you repeat the question, please?
(Question read by the reporter.)

A. I generally make an appraisal on the retail value.

(Testimony of Emanuel M. Lippett)

Q. By Mr. Bledsoe: Is that what you made in this particular instance? A. I believe I did.

Q. In other words, if you set up the valuation of a ring as \$300, that would be the retail market value?

The Court: What is the difference between the retail value and the import or wholesale value?

A. The difference would be about 35 or 40 percent, and the reason that the retail value should always be [264] invoked in an appraisal is because the insurance company has a clause that permits them to replace the merchandise or pay cash, and we always make it a practice to give the retail value, so that, if the insurance company wants to go out and buy it, that is their prerogative, and they can so choose.

The Court: It is customary to give the retail value, and the insurance company could replace it at wholesale?

A. They could.

Q. By Mr. Bledsoe: Sometimes it is impossible to reproduce an article?

A. It depends on the condition of the market.

Q. Do you recall when Mr. Williams purchased an emerald bracelet from you?

The Court: Emerald?

A. An emerald and diamond bracelet.

The Court: I think the description says it is an emerald and 84 diamonds. Item No. 4. 1 diamond and emerald bracelet.

Mr. Bledsoe: That is correct.

The Witness: May I see the description of it, your Honor?

The Court: I am handing the witness Exhibit No. 1.

The Witness: Thank you.

(Testimony of Emanuel M. Lippett)

The Court: You are referring to what item on that list?

Mr. Bledsoe: I am referring to item No. 4. [265]

The Court: What do you want to know about it?

Mr. Bledsoe: That is in his appraisal.

The Court: But this is the description. You asked him if he ever appraised it.

Mr. Bledsoe: If he sold it to Mr. Williams.

The Court: Referring to item No. 4, you sold that?
A. I did.

Mr. Bledsoe: I want to call the court's attention to the description of the item. I don't know if that was the witness' description. In other words, there is some discrepancy here, or will be, in the amount of diamonds.

The Court: He says he sold item No. 4. Do you remember how many diamonds were in that?

A. I do not, no.

The Court: About how many?

A. I do not know.

The Court: You don't know? Could it have been as many as a thousand diamonds?

A. No, sir. It could be as many as are described in item No. 4.

The Court: Is that usually the number of diamonds in a bracelet? A. No, sir.

The Court: How many are usually in it?

A. It varies according to design and pattern. But the design of the bracelet would indicate the cumulative [266] amount of diamonds.

Q. By Mr. Bledsoe: I show you, Mr. Lippett, a check dated 6/2/1939, in the amount of \$355, signed

(Testimony of Emanuel M. Lippett)

by Sydney M. Williams, to E. Manny Lipetz, and ask you if you received that on or about the date it bears, in payment of the bracelet?

A. This appears to be the check that I received in payment for the bracelet.

Q. You only received one check?

A. To the best of my recollection, I only received one check.

The Court: Do you want to offer it in evidence now?

Mr. Bledsoe: This is part of the Superior Court records and exhibits. I offer it in evidence, and it may be withdrawn at the conclusion of the case.

The Court: You can substitute a photostat.

Mr. Bledsoe: I will offer this in evidence.

The Court: It may be admitted in evidence, and the order is that the clerk will have it photostated, front and back, the original to be returned to the Superior Court files. That is a check dated when?

The Clerk: June 2, 1939.

The Court: And it was Defendants' Exhibit H in case No. D-198085 in the Superior Court of Los Angeles County. It is a check for \$355, and signed by Sydney M. Williams, and was made payable to E. Manny Lipetz.
[267]

The Witness: It was made to E. Manny Lipetz, and at that time the name was Emanuel Lipetz.

The Court: You are the same person described here as E. Manny Lipetz? A. I am, sir.

The Court: All right.

(Testimony of Emanuel M. Lippett)

Q. By Mr. Bledsoe: Mr. Lipetz, the fact that he purchased the bracelet for \$355 didn't have anything to do with your appraisal? I notice it is appraised at \$900.

A. I don't fully understand you.

Q. You appraised the bracelet later as being valued at \$900. In other words, the bracelet was sold on June 2nd and appraised on June 23rd.

A. To the best of my recollection that bracelet was turned over to me by a customer of mine, in my Santa Monica store, and she was quite in distress and was in need of money immediately, and I offered the bracelet to Mr. Williams, and explained to him the circumstances, and said that he might go out and have an outside appraisal. I believe the lady asked for \$300, and I charged the difference for my brokerage commission, but I did represent to Mr. Williams that the bracelet was worth far in excess of the amount, and assured him it was handled in protection of my customer. And I appraised it at about \$900 for replacement purposes.

Q. Do you recall whether or not, some time later, Mr. [268] Williams gave you a check for \$500 in further payment of the bracelet?

A. I have no recollection of such a subsequent payment.

Q. If he had paid \$855 for the bracelet, it would have been appraised at a higher figure by you, would it not?

A. If I appraised it at \$900, it must have been the replacement value.

Q. But the fact that it was appraised at \$900 would indicate to you that Mr. Williams had not paid \$855?

The Court: That is argument.

(Testimony of Emanuel M. Lippett)

The Witness: To the best of my recollection—I have no recollection of receiving an additional amount other than \$355.

The Court: You don't remember, or you don't think you did? A. I don't think I did.

The Court: Don't you keep books?

A. I did, and I went back, after receiving the subpoena, to search my books in 1939, and I haven't got records for 1939 or 1940. I have made two moves since then, and a lot of the records have been burned up. I will go on record as saying that this was \$355 retail price to Mr. Williams.

The Court: And that is what he paid for it?

A. To the best of my belief, that is what he paid.

[269]

The Court: You have looked for those books?

A. Yes, sir.

Q. By Mr. Bledsoe: This was a cash deal, was it not?

The Court: What do you mean—cash—no credit?

Mr. Bledsoe: That is right.

A. Right.

The Court: Do you mean cash in hand, and not check? In other words, he paid you, at the time he received this article, the full price? A. Yes, sir.

The Court: And he received it on or about the date that check bears? A. That is right.

The Court: Did you sell many items of jewelry to Mr. Williams?

A. I sold him two or three items, two for sure, and one there is some doubt whether I handled the item or sold it.

(Testimony of Emanuel M. Lippett)

The Court: What other item?

A. That is an attachment to a watch.

The Court: A bracelet attachment to a watch?

A. To a watch.

The Court: Did you know him personally?

A. Yes, I did.

The Court: Did you know him well?

A. Not too well.

The Court: Did you have other business dealings with [270] him? A. No, I did not.

The Court: So that the only two business dealings you had with him were these two pieces of jewelry?

A. That is right.

The Court: And you don't know whether he paid you \$500 or more or not for this one piece of jewelry?

A. I think the retail price was \$355. I don't think so.

The Court: You think some of your books are burned?

A. Some were destroyed. I was at that time in the wholesale business and diamond importing from Belgium, in 1941, when our offices were invaded in Belgium, and I went into the retail business, and I had no cause to continue to keep any records. And I then moved out of the Metropolitan Building, to Santa Monica, and I took some files along, and I destroyed whatever files we didn't think we would need.

The Court: Prior to the time of selling the bracelet, you also sold a wedding ring to Mr. Williams?

A. I did.

The Court: Do you remember whether or not you sold a wrist watch attachment?

A. I have already told the judge that there was a question of a wrist watch attachment, and whether I had

(Testimony of Emanuel M. Lippett)

it for repairs or whether I sold it I cannot truthfully answer; I don't remember. [271]

Q. Referring to Plaintiff's Exhibit 4, a \$90 check, dated 5/12/1939, payable to yourself, could you tell us what you received that for?

A. I believe this was in payment for the wedding ring which I made for Mrs. Williams.

The Court: That is Exhibit number what?

Mr. Bledsoe: Exhibit No. 4, your Honor.

Q. By Mr. Bledsoe: The wedding ring was a diamond studded band?

A. It was a wedding ring designed for Mrs. Williams, that was studded, I believe, with 11 diamonds.

The Court: Is the wedding ring available now, so that this witness can look at it and say whether or not that is the wedding ring?

Mr. Bledsoe: No, your Honor.

The Witness: No.

Mr. Taylor: If your Honor please, I asked Mrs. Williams, and she says she does not have it with her.

The Court: Where is it?

Mr. Taylor: She says she does not know where it is.

The Court: When did you last see it?

Mrs. Elizabeth J. Williams: I had it until 1941, when I wore it, but I don't know where it is. [272]

* * * * *

Cross-Examination.

Q. By Mr. Penney: Mr. Lippett, do you recall the name of the lady for whom you were handling this transaction? A. I do not, sir.

(Testimony of Emanuel M. Lippett)

Q. Do you have any independent recollection of the bracelet?

A. My best recollection is that my brother, who was managing my Los Angeles store, called me on the telephone and told me of this customer and made the valuation, and I told Mr. Williams about it, and he said he would be interested to see it.

Q. There was a difference at that time of around 35 percent between importer's price and retail price?

A. Yes, sir.

Q. And in June of 1939, within three weeks of this transaction, you appraised it at \$900, didn't you?

A. That is right.

Q. So that you couldn't have purchased it at importer's price for less than about \$600, could you, at that particular time?

A. I must explain. The lady was there and set her own price. I believe at that time the piece was worth around \$900, and I think Mr. Williams gave testimony that it was worth really about \$1500.

Q. My question is: You, as an importer, could not have purchased that for less than about \$600, could you. [273] around that figure?

The Court: You mean in the ordinary course of business?

Q. By Mr. Penney: In the ordinary course of business as an importer. A. Probably not.

Q. You were in the jewelry business at that time?

A. Yes, sir.

Q. Would it refresh your recollection now that Mr. Williams gave you a check for \$500, and then subsequently gave you a check for \$355, to complete the transaction?

(Testimony of Emanuel M. Lippett)

A. I am sure there was no other check than the \$355.

Q. Were the prices of precious jewels going up in 1939?

A. They were quite stabilized about that time. The prices commenced going up in 1941, after the invasion of Belgium. That was not only diamonds; it was mounted pieces, and this was manufactured, in my opinion, in 1927 or 1928, and that piece was mounted in platinum, and had emeralds in it, and it would not be easy to establish replacement value in 1939, because there would not have been many customers for that type of pieces.

Q. Would you increase or decrease the value of a diamond bracelet by breaking it up?

A. You would decrease it.

Q. This particular bracelet, what, in your opinion, would it be decreased in value, by breaking it up into loose stones? [274]

A. If I sold it for \$355, I must have taken into consideration that, had I broken it up, I would have gotten less than \$355.

Q. You subsequently discussed this matter, did you not, with Mr. Reynolds, of Toplis & Harding?

A. I had a telephone conversation with him, to the best of my recollection.

Q. You had appraised all of the jewelry that was covered by the policy? A. Yes.

Q. Didn't you tell him, in substance or effect, that in 1940 you couldn't replace those articles for less than \$10,000?

A. I told him over the telephone that the insurance company couldn't replace the jewels that I appraised and secure any savings between what they had to pay the claim-

(Testimony of Emanuel M. Lippett)

ant in cash and the replacement value. I don't recall setting a figure of what it would cost him, unless he has a memorandum of it.

Mr. Penney: That is all.

Redirect Examination.

Q. By Mr. Bledsoe: I would like to ask a further question. Let us take item No. 5, the bracelet. The bracelet could have been identified, could it not, subsequently?

The Court: Item 5 or item 4? Item 5 is the ring.
[275]

Mr. Bledsoe: Pardon me. Item 4—the bracelet—isn't that correct? A. That is correct.

Q. If the stones were taken out subsequently the stones could not have been identified, could they, of that size?

A. It would be very difficult to identify stones after they had been broken up.

Q. So, if a person wished to sell an article, and he wanted to know the type of article it was, if he took the stones out he could sell them, could he not, without having them identified?

Mr. Penney: I object, your Honor.

Mr. Bledsoe: I am asking him as an expert.

The Court: Well, do you have to have an expert to testify to that? [276]

* * * * *

Mr. Penney: Your Honor, we are perfectly willing to stipulate that if Alfreda Noland were sworn and testified, she would testify that she is a qualified court reporter, that she reported the proceedings in the divorce action between Sydney M. Williams and Elizabeth J. Williams—

The Court: As an official reporter of the County of Los Angeles?

Mr. Penney: As an official reporter, and that she kept accurate notes; that her notes do not disclose that Mrs. Williams was interrogated on the question of a robbery, and that her notes do not show that Mrs. Williams ever made the statement to the effect that she lost any jewelry in a robbery.

Mr. Bledsoe: Or whether there was or was not a robbery at any time.

Mr. Penney: I accept the stipulation that she would so testify.

Mr. Bledsoe: We will stipulate further that Mr. Williams testified on the question of what jewelry he had, what the jewelry belonging to him consisted of.

The Court: The items mentioned in the complaint?

Mr. Bledsoe: With the exception of the diamond wedding ring, and with the exception of a friendship ring, that they were stolen in a robbery, and that he no longer had them, and that the robbery occurred on January 1, 1940, according to his testimony. [282]

The Court: Do you accept that?

Mr. Penney: No, I can't stipulate to that, because I have the exact words from the notes.

Mr. Bledsoe: With the exception of the wedding ring.

Mr. Penney: Here are the exact words that he testified, as follows: Betty and I were together in Calexico, and there was a hold-up, and the diamonds were taken from my purse, and there was insurance recovered on them, and that the diamonds referred to in that testimony is the same jewelry mentioned in the complaint herein.

The Court: Excepting the wedding ring.

Mr. Penney: That is right. And that we were here when the reporter stated this morning that she had misread the word "Betty" and had read it as "Sydney," when she went over the testimony last Saturday.

The Court: You understand Mr. Penney's stipulation?

Mr. Bledsoe: Yes.

The Court: Let us get this one rung of the ladder at a time. You stipulate to that?

Mr. Bledsoe: Sure. And he also testified that all the jewelry mentioned in the complaint, with the exception of the wedding ring, was his personal property and belonged to him, except further that he did give a friendship ring to his wife, but all the rest of it was his own personal property and did not belong to Mrs. Williams.

The Court: All right. Mr. Penney, let me see if I [283] understand Mr. Bledsoe's offer of stipulation. If I understand his offer of stipulation correctly, it is that, at the divorce trial, Mr. Williams testified, and the testimony was recorded by the reporter, Mrs. Noland, that the items of personal property, to-wit, jewelry, which are mentioned in this complaint, that at the time he bought them and at all times he had them in his possession, they were his separate property.

Mr. Penney: I have no objection, except item 2, 1 platinum diamond wedding ring.

The Court: And the friendship ring?

Mr. Penney: And the friendship ring.

The Court: With the exception of those two items—

Mr. Penney: I accept the stipulation.

The Court: Was there any testimony there concerning the disposition of the—how much money?

Mr. Penney: \$4,250.

The Court: Was there any testimony about that?

Mr. Penney: I have not gone over the notes. I understand from Mr. Williams that there was testimony to the effect that that money was used in business.

The Court: By the way, these stipulations which have been entered into up to now—let us just forget the statement Mr. Penney made at the present time—do you accept the stipulations which have heretofore been agreed to by counsel? [284]

Mr. Taylor: I accept them.

The Court: You accept those, but I anticipate you likewise indicate that you reject the stipulation just offered by Mr. Penney?

Mr. Taylor: Yes, I reject that. [285]

* * * * *

JOHN MARCIN,

called as a witness on behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name.

A. John Marcin.

The Clerk: And your address?

A. 3170 East Green Street, Pasadena.

Direct Examination.

Q. By Mr. Bledsoe: What is your business?

A. Chauffeur.

Q. Some time in the year 1939 did you sell a ring to Mr. and Mrs. Williams? A. I did.

Q. Could you tell us what kind of a ring it was, Mr. Marcin?

A. Yes, it was a diamond ring.

(Testimony of John Marcin)

Q. Do you recall how large the stone was in the ring?

A. It was close to a two-carat ring.

Q. Do you have a man's ring now?

A. Not with me.

Q. Do you have one? A. Yes, sir.

Q. How large is that?

A. That is about a three-quarter carat, 90-point, about.

Q. In respect to that ring, how large was the ring [286] you sold to Mr. Williams?

The Court: What difference does that make, if it isn't here?

Mr. Bledsoe: You mean what difference does the size of the ring make?

The Court: If his ring isn't here that he wears.

Mr. Bledsoe: I will let it go.

Q. By Mr. Bledsoe: Referring to Plaintiff's Exhibit 2, a check dated May 5, 1939, made payable to John Marcin, I understood that check was given to you on or about the date it bears, in payment for a man's ring?

A. Yes.

Mr. Bledsoe: That is all.

Cross Examination.

Q. By Mr. Penney: Mr. Marcin, Mr. Williams did buy a ring from you and pay you \$250 for it?

A. Yes, sir.

Q. You were working for him at the time?

A. No, sir.

Q. Have you ever worked for him?

A. No, sir. Yes, I worked for him on a boat.

The Court: Were you working at the time you sold the ring?

(Testimony of John Marcin)

A. No, not at the time. I worked through the garage man I was working for, for him.

The Court: You worked for a garage man? [287]

A. And we both went down and worked for him.

The Court: And you both went down and worked on the boat? A. Yes, sir.

The Court: Your immediate employer, then, was the garage man? A. He paid me.

The Court: I see.

Q. By Mr. Penney: Was this purchase on or about the time the check bears date, that is, the 5th day of May, 1939? A. Yes, about that time.

Mr. Penney: That is all.

The Court: Mr. Marcin, here is Plaintiff's Exhibit No. 8. This is a diamond ring that has been referred to as a friendship ring for identification, which has a diamond in it. How big is that diamond?

A. I don't know. It don't look very big to me, not as big as the diamond ring I sold.

The Court: You were talking about a diamond ring about it being two-carat?

A. I would judge it would be around two carats, something like that.

Q. By Mr. Penney: Is it a perfect stone?

A. That is something that I don't know.

Q. Is there any difference in value between a perfect stone and an imperfect stone? [288]

A. I guess there is.

Q. You don't profess to be an expert on diamonds?

A. No, sir.

Q. Have you ever sold any diamonds besides this one?

A. No.

(Testimony of John Marcin)

Q. Did you ever weigh that stone that you sold to Mr. Williams? A. I never did.

Mr. Penney: That is all.

Mr. Bledsoe: If the court please, I forgot to ask a question.

The Court: All right.

Redirect Examination.

Q. By Mr. Bledsoe: Did you tell Mr. Williams at the time you sold the ring to him that you wanted to get married and needed the money?

A. No, sir. I needed the money, but not to get married.

Q. You had been married for a good many years prior to that time? A. Yes, sir. [289]

* * * * *

ELIZABETH J. WILLIAMS,
a witness heretofore duly sworn, upon being recalled,
testified as follows:

The Court: This is under 43 (b)?

Mr. Penney: Yes, sir.

Direct Examination.

Q. By Mr. Penney: Do you know Mr. Nathan Horowitz, who is in court here? A. Yes, sir.

Q. Did you see him some time in 1942, at his office?

A. I don't know whether it was in 1942, but I have been to Mr. Horowitz's office.

Q. Did you go to his office approximately two years ago and, in substance or effect, state that Sydney had given you a dirty deal, and that you were going to get

(Testimony of Elizabeth J. Williams)

even with him, and ask Mr. Horowitz the name of the insurance company, and the amount paid under the description of the jewelry covered under the policy?

A. I did not. I went to Mr. Horowitz and asked him [290] the name of the company that the diamonds were insured with.

Q. And that is all that you stated to him at that time? A. Yes, sir.

Mr. Penney: That is all, Mr. Horowitz.

NATHAN H. HOROWITZ,

called as a witness in behalf of defendant Sydney M. Williams, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Nathan H. Horowitz.

The Clerk: And your address?

A. 141 South Vista Street.

The Court: Los Angeles?

A. Los Angeles.

Direct Examination.

Q. By Mr. Penney: What is your business or occupation, Mr. Horowitz?

A. Insurance agent and broker.

Q. Where is your office located?

A. 548 South Spring Street, room 740.

Q. Are you the agent for the Continental Insurance Company, the plaintiff in this case? A. I am.

Q. Did Mrs. Elizabeth J. Williams come into your [291] office approximately two years ago?

A. She did.

(Testimony of Nathan H. Horowitz)

Q. Did she tell you, in substance or effect, that Sydney Williams had given her a dirty deal, and that she was going to get even with him, and ask you the name of the insurance company, the amount paid, and the description of the jewelry covered under the policy?

Mr. Davis: I will object to that as not a proper impeaching question.

The Court: Overruled.

Q. By Mr. Penney: You may answer the question. Did she or did she not make that statement?

A. She did.

Mr. Penney: Cross-examine.

Cross Examination.

Q. By Mr. Davis: Mr. Horowitz, you say, in substance or effect, she said that. What did she first say when she came in to your office?

A. The exact conversation I don't recall, but I do recall that the effect and substance of the conversation on the visit to the office was inquiring regarding the—

Q. You say you can't recall the exact words?

A. The exact words, no.

Q. She came in and asked you first the name of the company?

A. I wouldn't say first, but in the course of the [292] conversation.

Q. And did you give her the name of the company?

A. I did.

Q. Did you give her the policy number?

A. I gave her the policy number.

Q. Are you sure about that?

A. Yes. The reason I remember it, I didn't have the file in my office, and it happened that the claim department

(Testimony of Nathan H. Horowitz)

of the Continental Insurance Company was next door to my office, and I went in there to find out if they had copies of the policies.

Q. Do they have the loss jacket in their office?

A. They keep the information in a jacket. There was a while I had the records, and my own records had the policy numbers, and, not having my own daily at the time, I didn't know what was the exact amount of the insurance involved on that particular policy or policies.

Q. Did you give her a copy of the policy?

A. No.

Q. You did give her the number of the policy?

A. Yes.

Q. And, in substance, she told you that she was going to disclose this fake robbery? A. No.

Q. She didn't tell you why she wanted the information? A. No. [293]

Q. She was more anxious to get the name of the company than anything else? A. That is right.

The Court: Did she say anything at all about this being a fake robbery? A. No.

Q. By Mr. Davis: You are a friend of Mr. Williams?

A. I am a friend of both.

Q. Of quite long standing?

A. No, I wouldn't say long standing. It was just a few years prior—the exact date I don't remember, but I have known them both. In fact, if anything, I think I knew them both about the same time.

Q. Let me ask you this, Mr. Horowitz: She told you that she wanted the policy, the name of the company—

A. That is right.

(Testimony of Nathan H. Horowitz)

Q. And in the course of the conversation she told you that Sydney had given her a dirty deal?

A. That is right.

The Court: Did you ask her how they were getting along? Did you ask her?

A. No. They were separated at the time.

The Court: And you knew that? A. Yes.

The Court: Did you ask her why she wanted the name of the company? [294]

A. She said she—

The Court: Did you ask her why she wanted this information?

A. No. She came in and said she wanted it, that she would like to have the name of the company, and that she was going to some attorney by the name of Taylor, who was going to handle her legal affairs, and that was the first time I had ever heard the name of Taylor. As I recall, she said he was in the Van Nuys Building.

The Court: That is the first time you had ever heard of a lawyer by the name of Taylor?

A. That is right. I presume she was referring to the man I have seen here in the courtroom.

Q. By Mr. Davis: She didn't reply to you at that time that she was going to tell Mr. Taylor that this was a fake robbery?

Mr. Penney: I object, your Honor.

Q. By Mr. Davis: Either in substance or effect, she did not state to you that she was going to tell Mr. Taylor that this was a fake robbery? A. No.

Q. And she didn't tell you that this was a fake robbery? A. No.

(Testimony of Nathan H. Horowitz)

The Court: When did you first learn of that accusation on her part, the accusation against Mr. Williams that this [295] was a fake robbery?

A. I didn't hear about it until it came up through the insurance company, I believe. The exact time I don't know, but I believe it came through from the adjuster who was handling the loss for the company. I think it was probably Mr. McAnally, if I remember right, an adjuster in the employ of the Continental at that time.

The Court: You wrote this insurance?

A. Yes.

The Court: Did you get an appraisal on these articles?

A. No.

The Court: You didn't receive one?

A. Yes, but I didn't get it. We got the appraisal in the course of writing the policy.

The Court: You received it from whom?

A. From Mr. Williams.

The Court: From Mr. Williams? A. Yes, sir.

The Court: Was he an appraiser? A. No.

The Court: Who was the appraiser?

A. I don't know who was appraiser. However, I just saw a daily Mr. Davis showed me, that had a name on it of Lipetz, or something like that.

The Court: Did you receive a written appraisal?

A. Yes. [296]

The Court: What did you do with it?

A. Turned it in to the policy writer of the policy, to send it along with a copy of the policy to the San Francisco office.

The Court: You don't keep it in your file?

A. No, because the appraisal is copied right onto the policy and clipped to the policy itself.

(Testimony of Nathan H. Horowitz)

Q. By Mr. Davis: In the usual course of business, when a loss is paid, the home office destroys the policy? I will withdraw the question.

The Court: Where does that leave the reporter?

Q. By Mr. Davis: You represent other companies besides Continental? A. That is right.

Q. And you report on all insurance you write for the Continental to the Los Angeles office, and they, in turn, report to the San Francisco office?

A. I did at that time. I can qualify that. You are referring only to the all-risk business and personal property?

Q. Just so we get the relationship straightened out. The Mr. McAnally you referred to was the company's adjuster?

The Court: He didn't refer to McAnally.

Mr. Davis: Yes, he did.

A. At that time he was.

Q. By Mr. Davis: And Toplis & Harding are independent contractors? [297]

A. I would like to say one thing. McAnally was not the adjuster at the time of the loss. The adjuster then was Frank Bangs, who passed away.

Q. Mr. McAnally was the adjuster at the time the question of the fake robbery came up?

A. That is right. [298]

* * * * *

CONRAD LEWBEL,

a witness heretofore duly sworn in behalf of the defendant Sydney M. Williams, upon being recalled, testified as follows:

Cross Examination.

Q. By Mr. Bledsoe: Mr. Lewbel, you are in the business of assisting private individuals who have claims against insurance companies?

A. I am sorry. I didn't hear you. I am a little hard of hearing.

Q. Mr. Lewbel, you assist private individuals to present claims to insurance companies?

A. I don't quite understand the question.

(Question read by the reporter.)

A. I am acting as an appraiser and assist in making claims, and I am called in by individuals, as well as insurance adjusters or insurance companies or attorneys. I am subject to call by anyone.

Q. How long have you known Mr. Williams?

A. I do.

Q. How long have you known him?

A. I would say since about, possibly 1936.

Q. You have assisted him, have you not, in preparing claims to present to insurance companies?

A. When you use the plural, I would say no. I assisted him in preparing a claim on a fire loss to the insurance company. [299]

Q. Didn't you also assist him in a smoke loss, prior to that time, in filing a smoke loss claim?

A. No. I represented the insurance company when there was smoke damage from a fire in an adjoining

(Testimony of Conrad Lewbel)

building. Mr. Williams was the owner of the premises at the time, but I was called in because of an argument between Mr. Williams and the insurance adjuster, and I was called in by the adjuster and paid by the insurance company, through the adjuster.

Q. In 1939 you had considerable business dealings, outside of insurance, with Mr. Williams, did you not?

A. In 1939?

Q. Yes.

A. I don't remember anything. I might have had some dealing with him, but I can't remember.

Q. Do you remember his account with Hutton & Company? Do you remember that he was indebted to Hutton & Company for \$15,000 or \$18,000, in the latter part of 1939?

A. I don't know much about his stock transactions with Hutton & Company.

Q. You endorsed a note for him at the bank, did you not? A. In 1939?

Q. Around there.

A. I don't remember. I don't know.

Q. Do you know whether or not you endorsed a note for [300] Mr. Williams in the sum of \$5,250 at the California Bank, to be paid to Hutton & Company, so they would not close his account?

Mr. Penney: That is objected to, your Honor.

The Court: It is compound. Objection sustained.

Q. By Mr. Bledsoe: Do you remember signing any note for Mr. Williams?

A. Possibly. I had loaned Mr. Williams some money, and I had some business with the California Bank, I

(Testimony of Conrad Lewbel)

think. I don't know whether I signed the note or not, but I did assist Mr. Williams; I know that.

Q. You endorsed a note for Mr. Williams at the California Bank, didn't you?

A. I might have. I really don't know. I would have to check.

Q. You received about \$2500 from Mr. Williams, didn't you? A. All I know—

The Court: When, counsel?

Mr. Bledsoe: I was speaking about the year 1939.

A. I don't remember anything in 1939. As a matter of fact, I am fairly certain there was nothing in 1939. I know that after Mr. Williams' divorce proceeding went on he was having money trouble, was short of money, and he told me his funds were tied up, and I had loaned him some money to help him out at the bank at the time, because the bank had a [301] mortgage on some property. I don't know just what the transaction is, but I did help him, and probably that was either in 1940 or 1941.

Q. Did you owe him any money in 1939?

A. I don't remember any.

Q. You received stock, did you not, from Mr. Williams, in the early part of 1940?

A. I would say no. He turned over some stock to me, because I had loaned him some money, and then, when Mr. Williams couldn't pay the loans back, he cashed the stock and paid me back.

Q. When did you handle the Claudette fire loss, Mr. Lewbel?

A. I don't know the exact date, but I would say I think it was sometime in late February or early March, 1939.

(Testimony of Conrad Lewbel)

Q. There was a large sum of money paid upon that claim; is that correct?

A. I don't know whether you would call it large. By comparison with other fire losses, I would call it small, but it was a substantial amount of money.

The Court: How much?

A. I think the stock damage was \$10,000, but I am not at all certain of it, and I think the fixture damage was in the neighborhood of about \$1,000.

The Court: Altogether about \$11,000 involved in the adjustment? [302]

A. In that fire loss adjustment.

Q. By Mr. Bledsoe: After the Claudette fire you had considerable business dealings with Mr. Williams, did you not?

A. I don't think I had any business dealings with Mr. Williams after the Claudette fire until sometime in 1940, but I am not at all certain about it. I would have to check the records.

Q. Did you assist Mr. Williams in this matter?

A. In what matter?

Q. The recovery for the—

A. This particular case?

Q. This particular case.

A. No, I did not assist him other than taking him up to Mr. Reynolds' office. I told Mr. Williams I didn't handle these sort of losses. I took him up to Mr. Reynolds' office and told Mr. Reynolds I knew him, and that he had a very nice reputation, and anything he could do for him I would appreciate.

Q. Did you also tell Mr. Reynolds that he could write his check at any time for \$25,000?

(Testimony of Conrad Lewbel)

A. I told Mr. Reynolds that he was worth a fair amount of money, that he was in fair financial shape. I don't remember telling Mr. Reynolds that he could write his check for \$25,000, because I didn't know whether he could or not. [303]

Q. You did know at the time you spoke to Mr. Reynolds that Mr. Williams was heavily indebted?

A. Not that I know of.

Q. What did you endorse the note at the bank for?

A. I don't know a thing about the note at the bank. I would have to check over the records. Really, I don't know or have no recollection at this time. I don't think I signed a note at the bank, unless at that time I had loaned Mr. Williams some money, or Mr. Williams had to get some money to pay an indebtedness.

Q. You remember receiving some stock from the bank, do you not?

A. I received stock from Mr. Williams. I don't remember receiving any from the bank.

Q. Did you receive 700 shares of New York Central stock from the bank?

A. I think some shares were turned over to me by Mr. Williams. I don't recall that they were turned over to me by the bank.

Q. And you got 100 shares of Santa Fe stock?

The Court: Did he get 100 shares of New York Central?

Q. By Mr. Bledsoe: Did you get 100 shares of New York Central stock from Mr. Williams?

A. I think there was some New York Central shares involved, and some Santa Fe. I have no recollection of the exact amount. I would have to go to the bank and check [304] with them.

(Testimony of Conrad Lewbel)

Q. How many times did you go to see Mr. Reynolds in regard to this particular loss here?

A. I saw Mr. Reynolds shortly after the loss occurred, and then I went up with Mr. Williams to see Mr. Reynolds. I think Mr. Williams had an appointment with Mr. Reynolds, and I went up with him, and then I didn't see Mr. Reynolds in connection with this loss—I do see Mr. Reynolds often on the street and in his office, and I have business with his office, but in connection with this loss I don't think—I don't know whether I did see him once again when he was in his office and asked him what sort of progress was being made. But I did speak to him in connection with this loss after I had spoken to Mrs. Williams, I think in Commissioner Doyle's court, at which time I gave him the information which I testified to.

Q. You were present in Commissioner Doyle's court at the time you refer to?

A. I had been subpoenaed there by Mrs. Williams' attorney, I believe.

Q. Did Mr. Williams at that time state that there were several loose stones that Mrs. Williams had?

* * * * *

A. No, he didn't.

Q. Was it mentioned that there were loose stones?
[305]

A. There was no mention at all: Mr. Williams told me, prior to going up to court, that he had heard that Mrs. Williams said she knew the whereabouts of the jewels that were supposed to have been taken in this robbery. That is the only information Mr. Williams gave me. And then I asked Mrs. Williams whether there was any truth to the fact that she knew where the jewels were

(Testimony of Conrad Lewbel)

which were supposed to have been taken in this hold-up or robbery, and she told me there was no truth to it, that she was just saying it to frighten Mr. Williams, and I went back and repeated that conversation I have told to Mr. Reynolds.

Q. That conversation you have just related?

A. Yes, sir.

Q. You are certain of that?

A. I am certain I went back to Mr. Reynolds and told him I had heard from Mr. Williams that Mrs. Williams had made the statement, and that I had questioned Mrs. Williams personally, and she denied making that statement and said that she knew nothing about the jewels, but I felt that I was in duty bound to report that fact to Mr. Reynolds.

Q. You stated that Mr. Williams sent you a communication that Mrs. Williams had stated that the robbery might have been a fake. When did he send that communication to you? [306]

* * * * *

Q. By Mr. Bledsoe: My question is—and I will withdraw the former question—How did you receive that communication?

A. I received that from Mr. Williams.

Q. Was it by letter?

A. No; I think he told me in person, or over the phone. I think he told me in person.

Q. How long before the Doyle hearing?

A. I think the day of the Doyle hearing.

Q. Well, what time of day?

A. I don't know whether—I attended the hearing—I made no record of it—I think I attended the hearing

(Testimony of Conrad Lewbel)

in the morning or the afternoon, but I know I attended the hearing, and Mr. Williams told me just before then, on the same day. He either telephoned me or told me in person. I am sure he told me before I went to the court house.

The Court: Counsel, I wonder if I might fix in my mind the date of the Commissioner's hearing? [307]

Mr. Davis: We haven't seen it yet, your Honor.

Mr. Bledsoe: The witness is referring to the Doyle hearing.

The Court: You just spoke about Commissioner Doyle's hearing. That was the conciliation hearing?

A. This was before Commissioner Doyle.

The Court: Or Rosalind Goodrich Bates?

A. I know I was subpoenaed to be there. I may be mistaken in the name.

The Court: It was a man?

A. Yes, it was a man, your Honor.

Mr. Penney: Mr. Barr advises me that he was the court reporter in the divorce action between Sydney Williams and Elizabeth J. Williams, that he was a duly qualified reporter, and that he would testify that his notes are accurate, and that his notes do not disclose that Mrs. Williams was asked any questions pertaining to any robbery in Calexico, and that there was no testimony on her part relating to it at that time.

Mr. Bledsoe: That is all right.

The Court: Was there any testimony that she still had them?

Mr. Penney: Was there any testimony in your notes that she still had them?

The Court: Any loose jewels?

(Testimony of Conrad Lewbel)

Mr. Barr: That I didn't look up. [308]

The Court: You haven't looked that up?

Mr. Barr: No, your Honor.

The Court: All right.

Mr. Penney: Will you stipulate that she made no such statement at that time, that she had any loose jewels in her possession, at the time of the hearing on the divorce action?

The Court: If she wasn't asked, she made no statement.

Mr. Bledsoe: She could have been asked and not said.

The Court: Was there any testimony by Mrs. Williams to the effect that she had loose diamonds?

Mr. Taylor: Mrs. Williams advises me, your Honor, that there was no testimony given at that time by her on that question.

The Court: You will all stipulate to that?

Mr. Penney: I will accept the stipulation.

Mr. Bledsoe: Yes, your Honor.

The Court: Mr. Barr, I think you may be excused.

Q. By Mr. Bledsoe: You were present in Mr. Doyle's court when Mrs. Williams testified?

The Court: Let us fix the time of that.

Mr. Penney: I have no way of knowing, because I didn't come into this case until afterwards.

Mr. Davis: I thought you were a better searcher than I was. I think there are a few references to the jewels in there.

The Court: All I want to know now is the date of Commissioner Doyle's hearing. And I want to relate it with [309] the other testimony, as well as her information to her lawyer, and the commencement of this suit. Other-

(Testimony of Conrad Lewbel)

wise it has no value. Do you know the date of this hearing?

A. I do not, your Honor. I think it was in the spring of 1941.

The Court: The spring of 1941?

A. I think that is it. I may be mistaken.

Mr. Penney: The 4th of August, 1941.

The Witness: Was it August, 1941?

The Court: Well, it was in the spring some time.

Mr. Penney: That is, late spring, your Honor?

The Witness: Was it Commissioner Doyle?

The Court: I don't know.

The Witness: Was it Commissioner Doyle?

Mr. Penney: Yes, your Honor, Commissioner Doyle.

The Court: Now, if you will ask your question, I want to make some sense out of it.

Q. By Mr. Bledsoe: At the time of the hearing we are referring to, in August, 1941, you heard Mrs. Williams testify that she could not return a 3-carat stone to Mr. Williams?

A. Mrs. Williams testify?

Q. Yes.

A. I don't remember any testimony. I don't know anything about the testimony. I wasn't paying much attention to it. [310]

Q. Did you hear her say—

The Court: Was your hearing impaired at that time?

A. It was worse than it is today. It is a hundred percent improved now. I was then hearing very, very poorly, and I had an operation a year ago in June, and I have recovered most of my hearing. But I paid no attention to the testimony, because it didn't mean anything to me.

(Testimony of Conrad Lewbel)

Q. By Mr. Bledsoe: Now, Mr. Lewbel, didn't you tell Mr. Reynolds some time during the month of August, 1941, when you spoke to him the second time, that there was a divorce proceeding going on between Mr. and Mrs. Williams, and that there was liable to be some fireworks between the two of them, and that, if anything developed in regard to the payment of the loss, you would come back and let him know?

A. No, that isn't the words of what was said. I can tell you what was said. When I reported this to Mr. Reynolds, Mr. Reynolds and I discussed Mr. and Mrs. Williams' divorce proceeding, and I told him that there was a bitter battle between the two, over which I felt badly, and Mr. Reynolds agreed with me and said that, in all probability, Mrs. Williams is very jealous and would probably do anything or say anything, and that he did not attach any importance to this information, that he felt that the robbery was a robbery, and the value paid represented truly less than the value of the items. And Mr. Reynolds then told me that he would appreciate it if Mr. Williams would ask at the divorce [311] proceeding about these jewels that Mrs. Williams said at one time she knew the whereabouts of, and then denied knowing, and, if she denied knowing the whereabouts of the jewelry at the time of the hearing, at the time of her testimony, and said there was a robbery, then he could skip it, but if she admitted knowing about the jewelry, if she was asked, to please come back and give him that information.

Q. Didn't you tell him there wasn't anything to it?

A. I didn't tell him anything at all about there being nothing to it. I told him there was a battle between these two people, and I related the conversation as I have given

(Testimony of Conrad Lewbel)

it to you. I also gave him—I met Mr. Reynolds and told him that question had been asked in court, according to Mr. Sydney Williams, and that Mrs. Williams answered that there was a robbery, and therefore she couldn't know where the jewels were, and that is the last of that conversation I had.

The Court: Mr. Williams did tell you that Mrs. Williams had been asked about the robbery?

A. That is correct.

Q. By Mr. Bledsoe: And did you tell Mr. Reynolds that?

A. I did. I met Mr. Reynolds and told him that.

Mr. Penney: I am not going to interpose an objection, but he put this witness on for rebuttal testimony, and I presume they will show by his testimony now—

The Court: You haven't rested yet. [312]

Mr. Penney: But they are calling him as their own witness.

Mr. Bledsoe: For cross-examination.

Mr. Penney: They have gone into a lot of matters that we should not be bound by.

Mr. Bledsoe: He testified about a communication he received from Mr. Williams, and that he went down to see Mr. Reynolds.

The Court: I think the door was opened.

Mr. Bledsoe: I am merely trying to cross-examine Mr. Lewbel.

Q. By Mr. Bledsoe: Mr. Lewbel, what time on January 1st did you see Mrs. Williams at your home?

A. They came to my house in the late afternoon of January 1, 1940.

(Testimony of Conrad Lewbel)

Q. Two or three o'clock?

A. It might have been three or four or five o'clock.

Q. Did Mr. Williams come directly to your house from Calexico?

A. I don't know whether they came directly or not, but Mr. and Mrs. Williams came together, and they said they had come in from Calexico.

Q. Did they tell you they had left the night before?

A. I don't remember.

Q. Was there any mention of what time they left Calexico? [313]

A. If they did, I don't remember it.

Q. Did they mention that they were in Calexico the morning of January 1st?

A. I don't remember. I think they stayed in Calexico over night, but that is just a wild guess; I wouldn't know. I knew they said they came back from Calexico.

Q. Did Mr. Williams tell you that that morning he had gone to the police station in Calexico?

A. What is that?

(Question read by the reporter.)

A. I don't remember that. They saw me late in the afternoon and told me about the robbery, and they told me they had gone to the police and reported the robbery, if that is what you mean.

Q. You are certain it was January 1st?

A. I am pretty sure it was January 1, 1940.

Q. Did you go to the Rose Bowl game on January 1, 1940?

A. It was New Year's Day, 1940, January 1, 1940.

Q. Did you go to the football game that day?

A. No.

(Testimony of Conrad Lewbel)

Q. You had some tickets to go to the game, didn't you?

A. I don't know, but we didn't go to the game.

Q. You had planned with Mr. and Mrs. Williams to go to the game, a few days before?

A. I don't know anything about that. I know I didn't [314] go to the football game.

Mr. Bledsoe: That is all.

Cross Examination.

Q. By Mr. Penney: Does your wife make social engagements for you, or do you make them yourself?

A. My wife makes the engagements for me.

The Court: And you keep them?

A. Whenever I do, I get into trouble. [315]

* * * * *

PEARL E. BLEWETT,

called as a witness in behalf of defendant Sydney M. Williams, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Pearl E. Blewett.

The Clerk: And your address?

A. 608 South Hill Street.

The Court: Los Angeles?

A. Yes, sir.

Direct Examination.

Q. By Mr. Penney: Is it Miss or Mrs. Blewett?

A. In business, it is Miss Blewett.

Q. What is your business or occupation?

A. I have quite a big stenographic service, letter shop and notary public business.

(Testimony of Pearl E. Blewett)

Q. At 608 South Hill?

A. At 608 South Hill. I have been on that corner for 22 years.

Q. Were you a notary public in 1940? [317]

A. Yes, sir.

Q. I will ask you to examine these two documents, Plaintiff's Exhibits 5 and 6, and state whether or not that is your signature.

A. Yes, it is.

Q. As notary public, on those two documents?

A. That is right.

Q. Do you keep any permanent records of acknowledgments you take on instruments?

A. I keep a record of every notary I take.

Q. Do you have that record with you in court at this time?

A. Yes, I have it here. That is on the 19th.

Q. Will you read into the record here what your permanent record of acknowledgements shows on the 19th of February, 1940?

A. Proof of loss by Sydney M. Williams and Elizabeth J. Williams, to Continental Insurance Company, *in re* hold-up. Paid 50 cents.

Q. Did those parties appear before you on that day and acknowledge that they were Sydney Williams and Elizabeth J. Williams?

A. They must have, Mr. Penney, because I don't take an acknowledgment unless they are there.

The Court: Do you have any recollection of it?

A. As far as I remember, they appeared before me.

(Testimony of Pearl E. Blewett)

Q. By Mr. Penney: Do you ever take an acknowledgment where the parties do not appear before you?

A. Once in a while, if I know them very well, I will take it, but never on a transfer of property. It might be I would on an affidavit or some document of that kind, but it must be someone that I know very well, or know their signatures.

Q. Do you know Sydney Williams?

A. No; I didn't know the man when he came in.

Q. Or do you know Mrs. Elizabeth J. Williams?

A. No.

Mr. Penney: You may cross-examine.

Cross Examination.

Q. By Mr. Bledsoe: I understand that you are testifying that they must have appeared before you, because you notarized it? A. Yes, sir.

Q. Isn't it possible that Mr. Williams might have been there and you notarized both signatures?

A. I doubt it very much.

Q. Do you make a record of notarial acknowledgments in such a situation, where one of the parties does not appear before you?

A. I wouldn't take their signature.

Q. You notarize some instruments—

A. It might be an attorney in the building, but I [319] don't take anybody out of the building there.

Q. Well, if an attorney comes in and tells you that Mrs. Jones signed this affidavit—

A. No; I won't take those acknowledgments. It isn't worth the 50 cents to me.

Q. Do you keep a record of every time you put your notarial seal on any document? A. Yes, sir.

(Testimony of Pearl E. Blewett)

Q. Or only in transfers of property?

A. No, sir. I keep a record of everything here.

Q. You keep a record of everything you notarize?

A. Everything I notarize.

Q. But you don't keep a record of everybody that appears before you?

A. If their signature appears on a document, I put it on my notary's record.

Q. You put on your record the people whose signatures appear on the document? A. Yes.

Q. But there is no indication in the record of whether or not they appear before you?

A. I just make a little notation, as I did in this case, of the kind of document it is, and the names of the people acknowledging.

Q. That isn't a transfer of property, is it?

A. No; but I keep a record of everything. [320]

Q. It is an acknowledgment?

A. It is a notary acknowledgment.

The Court: Let me see the claim.

Q. By Mr. Bledsoe: You have no recollection of ever having seen this lady sitting here?

A. Her face looks a bit familiar, but I have so many people coming before me that I don't know that I could definitely say she is Mrs. Williams. Her face looks a bit familiar to me, but that was 1940.

Q. Did you know Mr. Williams before? A. No.

Q. Did he come in to see you with anybody?

A. I don't remember.

Q. Do you remember Mr. Williams?

A. I don't know whether I would recognize him or not.

(Testimony of Pearl E. Blewett)

Q. He is sitting right there (indicating).

A. Is he the dark man?

The Court: You pick him out.

A. I would say it is this man (indicating); I am not sure.

Q. By Mr. Bledsoe: You think you saw him, your recollection is now, in 1940? A. 1940.

Q. How large an office do you have?

A. I employ four girls.

Q. Any other notaries? [321]

A. No; I am the only notary. I had a heavy notary business, have had until the government changed the form.

The Court: What do you mean "heavy"? 40 or 50 a day?

A. No, I wouldn't say that many, but I probably had at least 10 or 12 a day, and during the income tax period I had more, and right then was when the income tax period was on.

The Court: You had many more at that time?

A. Many more at that time.

The Court: As many as 20 a day?

A. Oh, yes.

The Court: Do you remember anybody else who appeared before you on that date, now?

A. I wouldn't, except from the record. I recall a number of these people, because they are regular clients.

The Court: Those that appeared there only on that day, do you remember what they looked like?

A. I know, because they are people I have known for a long time.

(Testimony of Pearl E. Blewett)

The Court: February 19th—is that right?

A. Yes. It is right up there (indicating).

The Court: Walter Withers?

A. I don't remember that name.

The Court: Do you remember what he looked like?

A. No.

The Court: Joe Ryan? [322]

A. He was the manager of the Los Angeles Theater, and I knew him.

The Court: What about Mabel R. Georgistra, Carl Maynard, Gertrude Elliott? A. No.

The Court: Do you remember J. B. Elliott, Gertrude Elliott? A. No.

* * * * *

Mr. Penney: The defendant Sydney Williams rests.

The Court: The defendant Sydney Williams rests.

Mr. Taylor: We rest. May I move to adopt the testimony given by Mrs. Williams under Section 43 (b), as being her testimony if we put her on the stand in her own behalf?

The Court: I guess all the testimony she has given has been under 43 (b).

Mr. Taylor: I guess that is correct.

The Court: The defendant Elizabeth Williams rests, and you move to adopt, as Mrs. Williams' testimony, the testimony already given, and the motion is granted, and you rest?

Mr. Taylor: Yes, your Honor. [323]

* * * * *

CHARLES GRIFFEN,

called as a witness in behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Charles Griffen.

The Clerk: And your address?

A. 810 South Spring Street.

Direct Examination.

Q. By Mr. Davis: What is your occupation?

A. I am an attorney. I am employed by the Association of Casualty and Surety Executives.

Q. What does that mean?

A. The Association of Casualty and Surety Executives is an association of 63 stock casualty companies, and my particular job is to check over any files of our member companies or any other casualty company, wherein they believe there has been any fraudulent personal injury claim.

Q. Directing attention to the matter of Sydney and Elizabeth Williams, has that come to your attention?

A. I received a phone call one time with regard to the matter. [324]

Q. Is the Continental Insurance Company a member of your group?

A. They are not, but I think they are affiliates of one of the casualty companies.

Q. Will you tell how the matter of Elizabeth and Sydney Williams came to your attention, and when?

Mr. Penney: To which I object as being incompetent, irrelevant and immaterial, as far as the defendant Sydney Williams is concerned.

(Testimony of Charles Griffen)

The Court: I fail to see the materiality. Of course, we are supposed to see everything in advance, but I can't see it.

Mr. Davis: All right. I will ask another—

The Court: What is the purpose of the testimony? It may be that it is permissible, as preliminary or as foundation.

Mr. Davis: This is preliminary. I will state to the court just what I expect to prove by this witness. Mr. Griffen will testify that he received a communication from Pinky Thompson regarding a possible claim of a fake robbery in this matter?

The Court: And what was the question you asked, to which counsel objected?

Mr. Davis: I did have a double question there.

The Court: Well, start over again.

Mr. Davis: I can ask it in two different questions.
[325]

Mr. Penney: I think the court will take judicial notice that Pinky Thompson is now dead, and I don't think we are going to have the testimony of a dead man introduced, and certainly it is hearsay testimony, and I certainly will object to any line of examination he has indicated.

The Court: I think you adduced some testimony from the witness about Pinky Thompson, what was said to him, or what wasn't said to him, but I have forgotten what it was.

Mr. Davis: I didn't introduce it in the course of this trial. It was brought out in a deposition, and I don't think it is material here, and I didn't go into it on the trial of this case.

(Testimony of Charles Griffen)

The Court: It has been mentioned here by question and answer, and I have forgotten what it was. I know the general effect upon my mind. The thing that registered was that this defendant, Esther Williams, or whatever her name is—Elizabeth Williams, had communicated it to Pinky Thompson, and I somehow got the notion that Thompson had told Sydney Williams. That is the very vague impression that is in my mind.

Mr. Davis: Well, we are willing to reopen, if the court wants it.

The Court: I am trying to determine whether this is rebuttal, in the first place, and, in the second place, whether it is admissible, as hearsay.

Mr. Penney: Pinky Thompson was Mrs. Williams' attorney [326] at the time of the trial, and we haven't even mentioned Pinky Thompson in our defense, so it couldn't possibly be rebuttal.

The Court: How was he mentioned here yesterday?

Mr. Penney: Not at all.

Mr. Bledsoe: She testified in her deposition.

The Court: I know it was mentioned audibly here.

Mr. Davis: Mrs. Williams testified that at this case in Doyle's courtroom, or outside in the corridor, she told her attorney, Mr. Thompson, about this matter, and she said that—I will withdraw that; I don't think she did testify here—but he reported it, reported it to somebody he thought was the proper person to report it to.

The Court: Then it was the testimony of Mrs. Williams?

Mr. Davis: I think I am correct on that. That is my recollection. It was in the deposition.

(Testimony of Charles Griffen)

The Court: I don't remember reading it. I remember hearing it here, something to the effect that the general idea was that she should have told Thompson and didn't tell Thompson, and then there was a change of lawyers. Maybe it was cross-examination brought out by Mr. Bledsoe.

Mr. Bledsoe: This is rebuttal. Mr. Williams has now testified this was a robbery, and this is rebuttal. It shows that there was not a robbery, in contradiction of what Mr. Williams said. This is just one of the corroborating circumstances. [327]

The Court: How do you expect it to be binding upon Mr. Williams?

Mr. Davis: If Mrs. Williams had told Mr. Griffen, yes, it would be binding on both of them. Mr. Griffen's testimony will be that the communication came from a third party. I don't believe it is binding on either of them.

The Court: On Sydney Williams?

Mr. Davis: Yes.

The Court: Mrs. Williams testified, I believe, that she told Mr. Thompson about this matter.

Mr. Davis: She did.

The Court: Where is this deposition you were reading from yesterday? Here it is.

Mr. Penney: Page 27.

Mr. Davis: It is on page 28, your Honor. Page 28 is where she says she told Mr. Thompson.

The Court: Have you asked your question?

Mr. Davis: I had asked two questions.

(Testimony of Charles Griffen)

The Court: You had asked one, and were going to split it up.

Q. By Mr. Davis: When did this matter of Elizabeth and Sydney Williams first come to your attention?

Mr. Penney: I object to that as incompetent, irrelevant and immaterial and hearsay, and outside the presence of Mr. Williams, and not binding on him in any way.

The Court: Under the offer of proof it would not be binding, but in the present state of the record the objection [328] is overruled. If it is not connected with Mr. Williams it will be stricken as to him.

A. In the early part of October of 1941.

Q. By Mr. Davis: Don't tell me any communications, but just answer the questions. How did this matter come to your attention?

A. It first came to my attention by telephone from S. W. Thompson, known as Pinky, I believe.

Q. Did Mr. Thompson relate any of the facts or purported facts to you regarding the matter?

Mr. Penney: To which I object as incompetent, irrelevant and immaterial and not binding.

The Court: That objection is not good.

Mr. Penney: And on the further ground, your Honor, that it calls for hearsay.

The Court: As to your client, it is sustained, but it is admissible as to the other defendant.

Q. By Mr. Davis: What did Mr. Thompson tell you?

A. He asked me—

Mr. Penney: To which I now object, your Honor, on the ground that, under the statute, it would be a privileged communication.

(Testimony of Charles Griffen)

Mr. Davis: Do you waive the privilege?

The Court: I don't know whether it is privileged or not. Did Mr. Thompson consult with you in your professional capacity as a lawyer? [329]

A. He called me because he knew I was representing the insurance company.

The Court: Did he call you in that capacity? You don't practice law? A. No.

The Court: As a matter of fact, you don't practice law? Your time exclusively is devoted to this business, is it not?

A. That is right. I have no private practice at all.

Mr. Davis: If the court please, I am a little bit doubtful myself, and the only point is that such communication was made anyway, and I think that is enough, rather than argue the question of admissibility. That is all there was to it, anyway.

The Court: I don't know what there is. You have asked him if the matter involved in this lawsuit was brought to his attention.

Q. By Mr. Davis: What was brought to your attention by Mr. Thompson?

Mr. Penney: I suppose I have to object to each question, your Honor.

The Court: I think you will have to object if counsel insists upon his right to have you object to each question. If he does not, there will be no objection to your objecting to this entire line of testimony as to what was said to this witness by Mr. Thompson, on the ground that it is hearsay, and it is sustained, and will be deemed to have been made [330] and sustained as to your client Sydney Williams, as to each question appertaining thereto.

(Testimony of Charles Griffen)

Mr. Penney: Thank you, your Honor.

The Court: Without the necessity of repeating the objection each time.

Mr. Davis: Will you read back my question to Mr. Griffen?

(Question read by the reporter.)

A. He told me that he believed there had been a fraud committed upon one of the casualty companies. You understood I was representing all of them. And he asked me to come down to his office and discuss the matter, which I did. And, after going down there he told me that—I have forgotten now whether it was a burglary or a robbery loss of Sydney Williams and his wife. And he said he now represented Mrs. Williams, that they had separated and were having trouble, and that she was willing to tell the story about this robbery or burglary loss, and would tell me it was entirely fraudulent. And he said he thought she was interested in having a criminal prosecution. If you are interested in my reply—

Q. Yes.

A. I told him in the first place I had never worked on burglary losses; that the only thing I was interested in was personal injury and if it affected one of my companies I would be glad to communicate the information to them, and if [331] the company was interested, and if a criminal prosecution was instituted I would tell them where to get the information. Then Mr. Thompson said he would make an appointment for Mrs. Williams to be in my office on October 6th. He called me and said she would be there at a certain time, and she failed to appear, and I called him back on the phone, I think that afternoon, and told him she had not shown up, and he said he would

(Testimony of Charles Griffen)

make another appointment, and later he called he and said she would be down on the 8th. On the 8th I waited for an hour or two after she was supposed to be there, and called Mr. Thompson and said she had failed to appear. And he said, "I have talked to her since, and she doesn't want to come down." I then went to the adjuster for the Continental Insurance Company and told him I had no interest in the matter myself, but that I would pass along the information for what it was worth to him. I have only met the man on one occasion, and I think it was—

Q. If I name the name to you, can you—

A. Yes.

Q. Was it Mr. Bangs?

A. I am sure that is the name. [332]

* * * * *

GEORGE P. MEYERS,

called as a witness in behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name.

A. George P. Meyers.

The Clerk: What is your address?

A. 1515 Murray Circle, Los Angeles.

Direct Examination.

Q. By Mr. Davis: What is your business or occupation?

A. I manufacture commercial fishing gear.

Q. Do you know Elizabeth Williams or Sydney Williams, or both of them?

A. No. I know Mrs. Williams.

(Testimony of George P. Meyers)

Q. Do you recall seeing Mrs. Williams some time in the summer of 1940?

A. Yes, some time, August or September of that year.

Q. Where did you see her?

A. At her home.

Q. Where was it?

A. Somewhere in North Hollywood, just off of Dark Canyon.

Q. Dark Canyon? A. Dark Canyon.

Q. Who was with you?

A. Mr. and Mrs. Fadden.

Q. Where are they? [333]

A. Mr. Fadden has passed away, and Mrs. Fadden is in Los Angeles somewhere.

Q. What was the occasion for going to her house?

A. To pay a visit.

Q. The three of you?

A. Yes, sir.

Q. Was anything unusual brought to your attention?

A. Only that she was showing us through the house, and there was a door, and the panel had been sawed out between the bathroom and the dressing room.

Q. What did you do?

A. She asked us if we would take the door off, so she could get in and out.

Q. Did you take the door off?

A. We took the door off.

Q. Who did it?

A. Mr. Fadden and myself.

Mr. Davis: That is all.

The Court: Cross-examine.

(Testimony of George P. Meyers)

Cross Examination.

Q. By Mr. Penney: When did you say this occurred?

A. Some time in August or September, 1940.

Q. Where were you living at that time?

A. At my ranch at Pico, California.

Q. Where had you been prior to going to this home?

A. Where had I been? I don't understand you. [334]

Q. Where had you been immediately before you went over to Mrs. Williams' home?

A. At the Faddens' home.

Q. Where were they living at that time?

A. On Kenmore Avenue.

Q. Do you know the number? A. No.

Q. Do you know the address of Mrs. Williams' home?

A. No, I don't know the address.

Q. Can you describe the place?

A. There was a living room, a bedroom upstairs and a bathroom upstairs, and a kitchen downstairs; I believe it was a round bedroom. I am not sure.

Q. How many bedrooms did this place have?

A. I wasn't paying any attention. We looked through the house, was all.

Q. One bedroom?

A. We saw that one round bedroom, I distinctly recall.

Q. Did they have more than one bedroom?

A. I think there was two. I think there are two bedrooms upstairs, and one was square and one was round.

Q. Any bedrooms downstairs?

A. I don't believe I recall seeing any bedrooms downstairs. There may have been.

(Testimony of George P. Meyers)

Q. A living room?

A. Yes, a living room. [335]

Q. Dining room? A. Yes, a dining room.

Q. A kitchen? A. Yes.

Q. That was all there was downstairs?

A. There was a bathroom downstairs.

Q. And two bedrooms and a bathroom upstairs?

A. I believe there was.

* * * * *

LUISE BERRENBERG,

called as a witness in behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

The Clerk: Will you state your name?

A. Luise Berrenberg.

Q. And your address?

A. 2032½ Vista Del Mar.

The Court: Los Angeles?

A. Hollywood.

Direct Examination.

Q. By Mr. Bledsoe: Mrs. Berrenberg, do you know Mr. and Mrs. Williams? [336] A. Yes, I do.

Q. Did you know them in 1940? A. I did.

Q. Did you have occasion to see Mrs. Williams some time in 1940? A. Yes, sir.

Q. At which time something unusual occurred?

A. I don't know what you mean by "unusual."

Q. Let me ask you: Do you remember when Mr. and Mrs. Williams separated in 1940?

A. No, I don't remember when they separated.

(Testimony of Luise Berrenberg)

Q. Do you remember that they did separate?

A. I do.

Q. Some time after that did you see Mrs. Williams?

A. I did.

Q. How long after they had been separated?

A. Well, I really don't know when they separated, but I saw her in the spring of 1940, some time in May, I think.

Q. What was the occasion of your going over to their house?

A. Well, a mutual friend of the Williams and myself, a very old friend, told me that they were separating, and that Mrs. Williams was in a very nervous state, and would I please see her and talk to her,—and she was alone—and try to comfort her and help her a little, which I did.

Q. Will you describe the condition, the physical [337] appearance of Mrs. Williams?

A. She was very thin and very nervous and terribly upset.

Q. What do you mean by that?

A. Well, naturally she was undergoing terrible emotional strain.

Q. Did you observe her crying, or anything like that?

A. One time she called me after I had been there and—

Mr. Penney: Your Honor, I am going to have to object again. This is not binding against Mr. Williams and is pure hearsay, and not rebuttal testimony.

The Court: I am wondering if it is rebuttal.

Mr. Bledsoe: I will state that we intend to prove by this witness—

(Testimony of Luise Berrenberg)

The Court: I suppose you intend to corroborate Mrs. Williams.

Mr. Bledsoe: Not only that, but Mr. Williams says there was a robbery and that he was not in San Diego, inferring, of course, that the stones were never taken out of the settings, and this witness will testify that she saw the stones and that they were out of the settings.

The Court: Overruled.

Mr. Bledsoe: I was laying a foundation.

Q. Did you stay over night at Mrs. Williams' house on the occasion when you went over there?

A. I did, several times. [338]

Q. On one occasion did Mrs. Williams show you a package? A. Yes, sir.

Q. Where was you when she showed you that?

A. They had a tower bedroom, and we went up to her bedroom and—

Q. The tower bedroom was where?

A. At the end of the living room there was an open stairway and a tower bedroom—

Q. Was it a circular bedroom?

A. It was a circular bedroom. And there was a dressing room off of the bedroom, I mean back and off of that room was a dressing room, and out of this dressing room she brought a little package and showed it to me.

Q. What do you mean "package"? What did she show you?

A. First she said to me, "Did you ever see any loose diamonds," just like that. She was nervous and fearful. And I said, "No, I have never seen any loose diamonds."

Mr. Penney: Your Honor, I want to object to this line of examination as hearsay, as far as we are concerned, and it is outside the scope of the issues.

(Testimony of Luise Berrenberg)

Mr. Davis: It was still going on at that time. Mrs. Williams' statement while the conspiracy was in existence is certainly binding on both defendants, and throughout the trial testimony has come in on that theory.

The Court: The objection is overruled for the time [339] being, subject to a motion to strike.

Mr. Penney: I want the record, then, to show that my objection has gone to all examination as to any conversations between her and Mrs. Williams.

The Court: Very well.

A. She took these diamonds—she had them in a handkerchief—out of something—I don't know what it was, because I wasn't interested in the diamonds, and she held them in her hand like this and showed them to me. I didn't count them or examine them, but I saw them.

Q. By Mr. Bledsoe: Were they all the same size?

A. No. I noticed there was one seemed larger than the rest, but I couldn't say.

Q. Were all the rest the same size?

A. I couldn't say to that.

Q. Do you know whether they were all the same size?

A. No; I am not a diamond expert.

Q. You have seen diamonds? A. Yes, sir.

Q. Did these appear to be diamonds?

A. They seemed to be.

Q. Did she state to you why she was showing them to you?

A. She was very fearful, and she said, "If anything should happen to me, I would like somebody to know this."

Q. You stayed all night? [340] A. Yes.

The Court: You stayed all night with her?

A. Yes, sir.

(Testimony of Luise Berrenberg)

Q. By Mr. Bledsoe: After that did you go back to see her again? A. I did.

Q. About how much time elapsed between the first time and the second time?

A. I wouldn't be able to say, but a week or two weeks.

Q. Less than a month?

A. I don't remember, Mr. Bledsoe.

Q. Did you observe anything upstairs in the bedroom at that time that was unusual?

A. She showed me the door where the panel was broken.

Q. Did she tell you what had happened?

A. What she thought had happened.

The Court: All of the testimony that this witness has given concerning conversations with the defendant Elizabeth Williams is stricken, in so far as the defendant Sydney Williams is concerned.

Mr. Bledsoe: Subject to a motion to strike.

The Court: I am striking it of my own motion. All of the testimony is admitted as against the defendant Elizabeth Williams. Only the testimony is admitted as against the defendant Sydney Williams which is not conversational.

Q. By Mr. Bledsoe: What did she tell you when she [341] showed you the door?

A. I asked her if the outside door was broken in, and she said no, and she thought that Mr. Williams came in and broke this door down to get those diamonds. And I said I didn't see why he should break a door down in his own house, that he would have to repair it. But that is what she thought he did. She said the diamonds were gone.

Mr. Bledsoe: That is all.

(Testimony of Luise Berrenberg)

The Court: Cross examine. That testimony as to conversation is likewise stricken as to the defendant Sydney Williams only.

Cross-Examination.

Q. By Mr. Penney: You say you know Mr. Williams? A. I know him casually.

Q. Have you ever met him? A. Yes.

Q. Been introduced to him? A. Yes.

Q. Where?

A. The first time was at the home of Miss Edith Simpson.

Q. Where was Miss Simpson living?

A. She lived on Hayworth then. She is now married.

Q. Do you recall when it was that you met Mr. Williams the first time?

A. I don't remember—some time within the last ten [342] years.

Q. Where were you residing in May of 1940?

A. On Laveta Terrace, with some friends of mine.

Q. You fix this as the early part of May of 1940; is that right?

A. The early part of May was when I first met Mrs. Williams.

Q. You are certain now about that date?

A. No, I am not at all certain about dates. I simply know that Miss Simpson called me and asked me to see her, after she had had a separation from her husband, and it was all very kindly, I am sure.

Q. I don't doubt that. I am not saying anything about the motive. I am only trying to fix dates.

A. I am in doubt about the dates; I am sorry; but it was in the spring, before she made a trip east. I remem-

(Testimony of Luise Berrenberg)

ber that, because I advised her not to go, and she went anyway.

Q. You think it was in May, 1940?

A. It would have been May, or maybe June.

Q. But she showed you some diamonds at that time?

A. No, not at that time. That was after she came back from the east. That must have been some time the latter part of August or some time in September.

Q. August or September. On your first trip over there wasn't she hysterical?

A. I didn't go over there before—it was after she [343] came back. She came to see me before she went east.

Mr. Penney: Your Honor, I made some notes here, and I may be in error. I am going to ask the reporter to go back and find out the first time she went over there.

The Court: The spring of 1940—saw her in May, I think, is what she said. That is the first time she saw the diamonds.

Mr. Penney: My note is that she stayed over night.

The Witness: That is the wrong date. That was when I first met Mrs. Williams, but I did not see the diamonds until later in the summer, after she came back from this trip east.

Q. You advised her not to go east, didn't you?

A. Yes, I did.

Q. And didn't you advise her not to go east, on account of her hysterical condition?

A. My idea was to get them together, and I thought he didn't want her to go, so she shouldn't go.

Q. You advised her not to go east? A. Yes.

(Testimony of Luise Berrenberg)

Q. And you advised her not to go east, because of her hysterical condition, didn't you?

A. No. I didn't notice her hysterical condition then. It was later that she developed that. One time she called me late, about the time she showed me the diamonds, and she was crying, and she asked me to come over, and she was still crying when I got there, so I would judge she was rather [344] hysterical, and she couldn't stop, and so I called the doctor, and he had to give her some medicine.

Q. Did he give her opiates?

A. He gave her what I would judge to be an opiate. I couldn't swear to what the doctor did give her, but she went to sleep.

Q. Have you seen her on other occasions on which opiates have been given to her? A. Oh, no.

Q. That is the only occasion?

A. That is the only one.

Q. Did you meet her for the first time in May, 1940?

A. Yes, I did.

Q. At her home? A. No. She came to see me.

Q. Who did she come to see you with?

A. She came, through Miss Simpson, who was busy, and couldn't come with her, and she said she would come to see me and would I talk to her and see if I could help her. Miss Simpson was a very old friend of mine and also a friend of the Williams, and her idea was to get the two together again, and she thought that with a little advice and a little counsel the girl would be happier, and she sent her to me for that.

Q. If I understand you correctly, Miss Simpson sent her to you? [345] A. Yes.

(Testimony of Luise Berrenberg)

Q. And that was in May, 1940?

A. That is what I think, about that time.

Q. And you had never met her before? A. No.

Q. And you didn't know anything about her problems?

A. No.

Q. Without being personal, Mrs. Berrenberg, do you follow some profession in which you give advice?

A. I am studying and have studied for many years a very fine line of metaphysics.

Q. Did she come to you professionally?

A. No, not professionally, because I didn't make it professional, but I was glad and willing to help her, because she was a friend of Miss Simpson's.

Q. Have you ever visited other persons who were having domestic rifts of any kind?

A. Not professionally.

Q. Did you ever contact Mr. Williams and suggest to him that it would be a good thing for them to get back together again? A. Yes, I did.

Q. When?

A. Mr. Williams came out to my house, and he brought Mrs. Williams with him and left her in the car outside, and came in and talked to me. [346]

Q. When was that?

A. That was about—I can't remember whether that was before she went east or after she came back.

Q. How long was Mr. Williams over at your house?

A. A half hour, maybe, or three-quarters.

Q. What did you and Mr. Williams discuss?

A. His trouble with his wife.

(Testimony of Luise Berrenberg)

Q. What did he say to you?

A. Well, I don't really remember everything he said.

Mr. Davis: What is this for—to test her memory?

Mr. Penney: Your Honor, this comes as the most amazing thing in this trial. Mr. Williams tells me that he has never seen this woman before, and I want to hear the rest of her story.

Mr. Davis: Conversation she and Mr. Williams had outside of the presence of Mrs. Williams and outside of the presence of the plaintiff is not binding on the plaintiff.

Mr. Penney: I want to test her memory now.

Mr. Davis: I still object.

The Court: I don't think it is cross-examination. I think it might be permissible on a certain feature of the trial. Mr. Williams has not yet testified on this. If that testimony were in the record it might be permissible to recall her on rebuttal and cross examine her.

Mr. Penney: That is all.

The Court: Step down. [347]

* * * * *

IRMA CUDD,

called as a witness in behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name. A. Irma Cudd.

The Clerk: And your address?

A. 6507 South Figueroa.

Direct Examination.

Q. By Mr. Bledsoe: Where are you employed, Miss Cudd? A. Federal Reserve Bank.

(Testimony of Irma Cudd)

Q. Do you know Mr. and Mrs. Williams?

A. I do.

Q. Did you know them in 1939? A. I did.

Q. Did you work at the same place Mrs. Williams worked at in 1939? A. Yes, I did.

Q. Where was that?

A. Claudette of Hollywood.

Q. What part of the year 1939? [348]

A. I went to work there in August.

Q. What was the place where you worked?

A. Claudette of Hollywood.

The Court: What is Claudette of Hollywood?

A. It is a garment manufacturer. I went to work there in 1938.

Q. By Mr. Bledsoe: Were you working there in 1939? A. Yes.

Q. The early part of 1939? A. Yes.

Q. Was Mrs. Williams also working there?

A. Yes, sir.

Q. Mr. Williams was the president and manager?

A. Yes.

Q. He was about every day?

A. Yes, some time every day.

Q. Did you observe what jewelry Mrs. Williams was wearing at that time? Can you state what jewelry she wore?

A. When I went to work there in August she had a diamond and a watch.

The Court: A diamond and a watch?

A. A diamond and a watch.

The Court: A diamond ring, you mean?

A. That is right.

(Testimony of Irma Cudd)

Q. By Mr. Bledsoe: Showing you Plaintiff's Exhibit 8, a ring, will you take a look at that and tell us if that [349] appears to be similar or the same ring?

A. Yes, I think it is the same ring.

Q. Did you observe at some time that Mrs. Williams acquired another ring? A. Yes.

Q. When was that?

A. I think it was in the first part of 1939.

Q. Will you just state the occasion on which you observed it? How large was the other ring?

A. It was larger than the one she had.

Q. What type of ring was it?

A. It looked to me to be an engagement ring.

Q. How did you happen to observe it?

A. I worked in the office, and they came back—

Q. Who do you mean?

A. Mr. and Mrs. Williams.

The Court: She wasn't Mrs. Williams then, was she?

A. No.

The Court: What was her name? A. Betty.

Q. By Mr. Bledsoe: What did Mr. Williams say to you?

Mr. Penney: I am going to object. There has certainly been no foundation laid for this type of examination, and he is asking no impeaching questions of any kind.

The Court: It may be rebuttal. It doesn't have to be impeaching to be rebuttal. [350]

Mr. Bledsoe: He testified he bought this ring in 1936. and she testified it was 1939.

The Court: 1938, she testified.

(Testimony of Irma Cudd)

The Witness: She was wearing one diamond ring when I went there, when I went to work there.

Mr. Bledsoe: Now I am referring to the engagement ring.

The Court: All right. The objection is overruled.

Q. By Mr. Bledsoe: What did Mr. Williams say to you?

A. I don't recollect the exact words, because I can't remember, but I know he bought the ring for Betty.

Q. Did he state that he bought it that day?

Mr. Penney: I am going to object to his leading the witness.

The Court: Yes, I think so.

Mr. Bledsoe: I know she can't remember the exact words, but there are certain times when a witness may be led, and this is one of them.

The Court: The objection is sustained. Of course, the harm is done now, but the objection is sustained just the same.

Q. By Mr. Bledsoe: Did Mrs. Williams say anything to you, in his presence, about this second ring?

A. I don't remember anything about that. I was under the impression that they had bought it that day.

The Court: Not what your impression was—just the best of your recollection as to what either of them said.

[351] A. I can't recall now.

The Court: In substance.

A. I was under the impression that Mr. Williams bought the ring for Betty that day.

(Testimony of Irma Cudd)

The Court: When you say you were under the impression, that is what is known in law as a conclusion of the witness, and I am the only one who is permitted under the law to draw conclusions, and I have to draw those conclusions from what the witnesses say people said. What gave you that impression? Was it something he said, or did you just figure that out for yourself?

Mr. Penney: Your Honor, the testimony is that the ring was bought about 1939, the engagement ring, and there is a check right here for \$500, so that it is perfectly all right. I will stipulate that that is what they did at that time, that is, that they bought it about that time, and that is what they told us.

The Court: What more do you want?

Mr. Bledsoe: I will accept the stipulation on the engagement ring, which is item number what? —on the 3-carat stone?

Mr. Penney: No.

Mr. Bledsoe: Item No. 5. I will accept the stipulation.

The Court: Is that the one which is called an engagement ring?

Mr. Penney: The one they talked about, the engagement [352] ring, is a different ring.

The Court: One platinum diamond engagement ring. That is No. 5. No. 3 is one diamond friendship ring.

Mr. Penney: He testified that No. 3, that was the friendship ring, was an engagement ring, and that was the

(Testimony of Irma Cudd)

ring which was purchased, and the check is right here in the record.

Mr. Bledsoe: I will accept the stipulation.

The Court: As I understand this witness' testimony, item No. 3 is a ring which the defendant, Mrs. Williams, was wearing in August, 1938, when this witness went to work with Mrs. Williams at Claudette of Hollywood. That is her testimony up to now. You go ahead.

Q. By Mr. Bledsoe: Did Mr. Williams state to you, in the early part of 1939, when they had the large engagement ring, the one you have in your hand, did he tell you anything that gave you the impression that that had just been purchased, that they had just purchased it that day? If he did, state to the court, to the best of your recollection, what you remember he said or she said in his presence.

Mr. Penney: May I ask one question: Describe the ring we are speaking about when we speak about the ring described as No. 5.

The Court: I don't think that makes any particular difference. She is talking about an engagement ring. You can cross-examine her on that. [353]

The Witness: I will have to have the last question again, please.

The Court: Yes, I think so.

Mr. Bledsoe: Let us withdraw that question.

The Court: Yes.

(Testimony of Irma Cudd)

Q. By Mr. Bledsoe: What did Mr. Williams and Mrs. Williams say to you when you were shown the large engagement ring, the one we have been referring to?

The Court: She testified that she doesn't remember what they said.

A. I don't know what they said. I think they bought it that day, is all I know. They came in together from being out.

Q. By Mr. Bledsoe: Did Mrs. Williams shows it to you? A. Yes.

Q. How large was it?

A. It was larger than the other ring.

Q. Did you ever see this on her hand?

A. She used to wear this on her left hand before she got the large one. After that she had it cut down and wore it on her little finger.

Q. She wore the second ring on the finger that a person would wear a ring on who was engaged?

A. Yes, sir.

Q. Did you notice her wearing any other articles of jewelry? [354] A. Yes; she had a watch.

Q. What kind of a band did it have?

A. A black band.

Q. Afterwards did you notice whether or not she had a different band on her watch? A. No.

Q. Did you ever see her with a watch with a diamond band? A. Not that I remember.

Q. When did you leave Claudette's?

A. After they had the fire.

(Testimony of Irma Cudd)

Q. I show you Plaintiff's Exhibit 7. Does that appear to be the watch that she wore with her diamond band?

A. Yes, I would say it was.

Q. At one time did you observe Mrs. Williams—did Mrs. Williams wear any other watch?

A. No, I just saw her wear this one with the black band.

Q. Every time you observed her did she have those three pieces of jewelry on her?

A. Yes, most of the time.

Q. Did you notice whether she wore the large engagement ring all the time?

A. She wore it all the time after she had it, until I left there after the fire.

Q. Did you see her in the year 1940? [355]

A. Yes; I used to see them both frequently.

Q. Did you observe whether or not she had the ring on her finger at that time, in 1940?

A. I really don't know.

Mr. Bledsoe: I believe that it all.

The Court: Cross examine.

Cross-Examination.

Q. By Mr. Penney: Is it Miss Cudd or Mrs. Cudd?

A. Mrs. Cudd.

Q. Referring now to Plaintiff's Exhibit No. 7, as I understand, you saw her wear this watch with the black band on it?

A. Yes. When I first knew her she had a black band on her watch, like this.

(Testimony of Irma Cudd)

Q. Did you ever examine that watch carefully?

A. No, not carefully.

Q. But this watch appears to be the type of watch she was wearing in 1938, when you first came there, but she wore it with a black band?

A. That is right. She had a black band.

Q. And Plaintiff's Exhibit No. 8 is the ring—would you say that is the same ring that she was wearing in—

Mr. Bledsoe: Is that Exhibit No. 8?

Mr. Penney: It is marked 8. I don't know whether it is 8 or not, but it is marked 8.

Mr. Bledsoe: All right. [356]

Q. By Mr. Penney: Is that the same ring that she was wearing in 1939?

A. Yes, she had this in 1939.

Q. That identical ring?

A. I would think it was that one, yes.

Q. Had you ever taken the ring off and looked at it?

A. Yes, I have had the ring.

Q. How many diamonds does it have in it?

A. I really don't know.

Q. As many as 30 small stones?

A. I don't know.

Q. Did you ever count them? A. No.

Q. Did you have it on before or after she had it cut down? A. I really don't remember.

Q. Do you know whether or not she had a different setting put in it after she had it cut down?

A. I don't know.

(Testimony of Irma Cudd)

Q. Do you know how large a stone this is?

A. I asked them once, and they said it was just a little under one carat.

Q. Who did you ask?

A. Mr. and Mrs. Williams.

Q. Mr. and Mrs. Williams? A. Yes. [357]

Q. Did you ask them about any of the other stones?

A. No. I was interested in this ring. I thought it was very attractive, and I just asked how big it was, and they said it was just a little under one carat.

Q. And aside from what she told you, you wouldn't have any idea how large it was?

A. I wouldn't have any idea.

Q. If I showed you any other stone would you have any idea how large a stone it was?

A. No, I wouldn't. I don't know anything about that.

Q. Did you see Mrs. Williams in 1940?

A. Yes. I used to see her lots of times. I used to go to their house.

Q. Did you see Mrs. Williams wear this watch in 1940, Plaintiff's Exhibit 7?

A. I don't know when it was.

Q. Did you see her wear that in 1940?

A. I can't remember.

Q. What is your best recollection?

A. Well, I don't know about the dates, sir.

Q. Do you know when they were married?

A. Yes.

(Testimony of Irma Cudd)

Q. They were living together in 1940, weren't they?

A. Yes, sir.

Q. And you were over there at their home, weren't you?

A. I don't know whether it was in 1940. I presume it [358] was.

Q. Did you see her wear this watch in 1940?

A. I say, I can't remember.

Q. How about the ring, Plaintiff's Exhibit No. 8?

Did you see her wear that in 1940?

A. Well, I would have to fix some dates in my mind before I—

Q. Can you fix the date now, before we have the recess?

A. I know I went to work in August of 1938, and I left there in 1939, in the spring of 1939, after they had the fire, and from then on I didn't pay any attention, because I used to just see them. I have seen them on several occasions. They were at my wedding in March of 1940, I know that.

Q. In March did you see her wear this ring?

A. I don't remember.

Q. Did you see her wear the watch?

A. I don't remember.

Q. Did she have on any jewelry?

A. I don't remember.

The Court: That was the night of your wedding?

A. That was the night of my wedding, and I wasn't paying attention.

(Testimony of Irma Cudd)

Q. By Mr. Penney: I will show you a check, which is payable to David Riskin, in the amount of—that is Defendants' Exhibit No. G in the— [359]

Mr. Davis: Has that been offered in evidence here?

Mr. Penney: No. This check bears date February 6, 1939.

The Court: Is that an exhibit here?

Mr. Penney: No, your Honor. It is Exhibit G in the Superior Court case, your Honor. It is in the amount of \$500, and is payable to David Riskin.

Q. By Mr. Penney: That was a month before you were married? A. Yes, sir.

Q. Is that right?

A. No, it wasn't the month before I was married. I was married in 1940.

Q. I beg your pardon. When was the fire?

A. In 1939.

Q. Do you recall the month in 1939?

A. I think it was March. It was before Easter of that year.

Q. When you saw Mrs. Williams with this new engagement ring you spoke about, was that about February, before Easter of 1939?

A. Yes; it was just right before the fire.

The Court: Are you offering that check in evidence?

Mr. Penney: I have no objection. I will offer it in evidence at this time.

The Court: It will be Defendants' Exhibit A. It will [360] be photostated and the original will be sent over to the Deputy County Clerk.

(Testimony of Irma Cudd)

Mr. Penney: That is all.

The Court: Any redirect?

Mr. Bledsoe: Just a short question.

The Court: All right.

Redirect Examination.

Q. By Mr. Bledsoe: Did you ever see Mrs. Williams put any mark of identification on the watch she was wearing, that would indicate to you that it was the same watch that is now before you?

A. I can't remember, sir; I can't remember. [361]

* * * * *

ROBERT L. REYNOLDS,

a witness heretofore duly sworn in behalf of plaintiff, upon being recalled in rebuttal, testified as follows:

Direct Examination.

Q. By Mr. Davis: Mr. Reynolds, you have been sworn? A. Yes.

Q. Mr. Reynolds, in any of your conversations with Mr. Williams, when he reported this loss, did Mr. Williams state anything to you about going to Yuma on the trip to Calexico in December, 1939? A. He did.

Q. Will you just state what he said?

A. Mr. Williams came into my office and sat in a chair directly opposite me at my desk.

Mr. Penney: I am going to object to that, your Honor. He is asking these questions, and they must be in the form of impeaching questions.

(Testimony of Robert L. Reynolds)

The Court: It may be rebuttal without being impeachment.

Mr. Davis: It is a rebuttal question, as to his own admission made to Mr. Reynolds.

The Court: What is the ground of your objection—that it is not proper impeachment? [362]

Mr. Penney: That is right.

The Court: Overruled.

Q. By Mr. Davis: You may go ahead and state.

Mr. Penney: And on the further ground, your Honor, that they cross examined Mr. Williams in their case in chief, and they cross examined her in their case in chief, and they should have given us an opportunity to go ahead and rebut that in our case.

The Court: I don't know what it is. This is a conversation, I take it, at the time Mr. Williams came to Mr. Reynold's office, that he testified about before. This is to rebut something that you have put on in your case. What it is I don't know.

Mr. Penney: It couldn't have been, your Honor, because they are the very questions they asked him in their case in chief. I didn't ask him anything about Mr. Reynolds in our case in chief.

The Court: Let me hear the question, and then I will know which ocean we are sailing on.

(Question read by the reporter.)

Mr. Davis: If Mr. Penney does not recall and your Honor does not recall, I will state what he said. After Mrs. Brown testified and when Mr. Williams was again on the stand, I asked him specifically if he did not go to Yuma, and he said he did not go to Yuma on that trip, and, although I don't believe it was necessary, I then put

(Testimony of Robert L. Reynolds)

it in the form of [363] an impeaching question also, and I asked him if it wasn't a fact that he told Mr. Reynolds so.

The Court: I think that is correct.

Mr. Penney: If he wants to put it in the form of an impeaching question—

Mr. Davis: I don't have to put it in the form of an impeaching question. I don't want to go over the things that were brought out in my first case. I am now rebutting his testimony.

The Court: Well, if it is pertinent.

Mr. Davis: It is rebuttal, your Honor.

The Court: You would have to put it in the form of an impeaching question, if it is general rebuttal, or on any matter that was brought out during the examination, or during the defendants' case. Then I think he is entitled to answer the general question.

Mr. Davis: That is what it is. It was brought out in their case.

Mr. Penney: Your Honor, there wouldn't be any question about it if Mr. Williams said he didn't go to Yuma; they could bring a witness in to prove that he did go to Yuma. But if they ask him the impeaching question, did you tell Mr. Reynolds that you didn't go to Yuma, then they have got to put the impeaching question in the same form they asked him.

The Court: I don't think they can go into the general [364] conversation. I don't think that is the purport of his question. I am inclined to think Mr. Penney is correct. The objection is sustained.

Mr. Davis: All right.

Q. By Mr. Davis: Mr. Reynolds, I will ask you if, at the time Mr. Williams reported this loss to you on

(Testimony of Robert L. Reynolds)

January 2, 1940, if he did not state to you that he, on December 31st, got up about 10:00 o'clock in the morning and went to the Browns' house, and found that they were not there, and he and Elizabeth drove to Yuma, arriving back at Calexico at about 6:30 in the evening?

Mr. Penney: To which I object as not being the question asked of Mr. Williams.

Mr. Davis: I have his notes and I brought mine up here and read from them when I propounded the question to Mr. Williams. That is the substance and effect of what I asked him.

The Court: My recollection was that you asked him if he told Mr. Reynolds that he had gone to Yuma, not if he had gone to Mrs. Browns' house.

Mr. Davis: I went back and got his file from him and got his original notes, and came up here and read from the notes to him, what was in the notes.

The Court: I think I will have to take your word for it. My recollection is not accurate as to this. I will overrule the objection. [365] A. He did.

Q. By Mr. Davis: Did you make a record of it at that time? A. I did.

Q. This record which you are referring to now was made at the time you held your interview with him on January 2, 1940?

A. That is right. I wrote down his answers on my book as I talked to him.

Q. You didn't write down the questions you asked him? A. No.

Q. But you wrote down the answers that he gave?

A. That is right.

(Testimony of Robert L. Reynolds)

The Court: Are you looking at that now?

Mr. Davis: Yes.

Mr. Penney: I would like to see it.

Mr. Davis: I will do better than that. Just to make the record clear, I am going to ask to have these records marked.

The Court: They can be marked for identification, but they should be shown to counsel.

Mr. Davis: Yes.

The Court: They will be marked for identification as Plaintiff's Exhibit 14.

Q. By Mr. Davis: Mr. Reynolds picked up two sheets here. Are they both part of this interview? [366]

A. Yes; there were two policies involved, a sheet for each policy, but the interview carries over from one to the other.

Mr. Davis: May we pin them together and mark them as one exhibit?

The Court: Yes.

Mr. Davis: May we have those clipped together as one exhibit, and offer them in evidence?

Mr. Penney: To which I object, if your Honor please, as being a self-serving declaration and not binding on us.

Mr. Davis: It is a declaration of one of the parties.

Mr. Penney: They are not in our handwriting.

Mr. Davis: They are corroboration of his testimony, as being a memorandum made at the time of the transaction.

Mr. Penney: Well, they were made and produced for the purpose of refreshing his recollection, quite obviously.

(Testimony of Robert L. Reynolds)

The Court: As I remember the section of the Code—it comes up in almost every trial—it says that the opposite party may offer them in evidence, but it doesn't say that the party who produces them may offer them in evidence, and there is a sound reason, because it reduces to writing the testimony of the witness and comes under the hearsay rule.

Mr. Davis: I think your Honor is right.

The Court: The objection is sustained. Mr. Penney may offer them in evidence, if he wants to. [367]

Mr. Penney: I don't want to deprive them of a permanent record, your Honor.

Mr. Davis: I don't know. Did you answer my question, the question asked about the statements made by Mr. Williams? Did you answer that? Mr. Bledsoe thinks I didn't get an answer.

Mr. Taylor: If your Honor please, on behalf of the defendant Elizabeth Williams, I desire to offer the exhibit into evidence.

The Court: It may be admitted.

The Clerk: Your Honor, it was first offered as Plaintiff's Exhibit 14.

The Court: I sustained the objection to that. Now this is an offer by the other defendant. You had better start in with AA now. This will be defendant Elizabeth Williams' Exhibit AA. Apparently Mr. Taylor is not so concerned about the records being kept complete as you are.

[DEFENDANT'S EXHIBIT AA.]

Claim No. A.4 - 408

Co. LatimerAmt. of Loss 300Broker RogerPolicy No. PF 303623Agent KentExpires 9-1-42HolidayTotal Amt. \$8000,-

Proof Instructions

Form Blank FormAssured Henry M. Williams & Elizabeth J. WilliamsRes. Address 3418 La Sierra Dr. - L.A. Ph.Bus. Address Ph. -Occupation Date Lost Location Item No. UnbreakableOne diamond ring set
centered with a small oval stone in top. \$300.
The Wedding Ring.Gold band - \$96.50 - 150 =One wristwatch - men's Omega. \$150.
Yellow gold case - 144 light on back
6 round leather bands.Appraised By Val. Est. 12001200Purchased From Reported 12/30 by JamesRemarks

No. 2738-PH
 UNITED STATES DISTRICT COURT FOR THE
 NINTH CIRCUIT
 FILED

Reporting Instructions:

PAUL P. O'BRIEN
CLERK

No. 2738-PH
 Continental vs Williams
 Lefts AA
AA
AA

J. M. Morris

(Defendant's Exhibit AA)

STATEMENT OF LOSS

8000 11-29 MA

TE 11/24/40

By Phone, Letter Interview, Answered

Sat. 12/30/34, left La. + drove to Colonia. Wf + self arrived there about 3:30 P.M. Went to Letanya Hotel. - took room #311. = No friends there. - Mr. Mrs. Brown - engaged agent. Sat. P.M. called on Brown + then went to Klein Station across street to check on John Doe Statement relative to theft of Mrs. Brown's car. - Worked at hotel. - Unfinished dinner served to several officers. - Sat. night left Peckord at Brown's station. Walked across border to Tornuello + walked around streets. - Went to El Gato Ode for dinner. - Brown + wife + child joined them after dinner, walked around some more + then returned to Colonia. - Walked and in Colonia. - Longstone. - Dog purchased about hotel about 9:30 P.M. - In hotel until evening. More dinner - Brown + wife in parlor. - Mrs. were drunk. -
Sun. A.M. ^{31st} Breakfast at hotel. - Self car went 10: A.M. + home to Brown's residence. - Mrs. B. mother.

Defendant's Exhibit AA)

about 8 when Brown - turned to come to
Keweenaw for the winter. He turned to -
Brown about 6:00 P.M. - just soon to be
evening and said dinner at Imperial Hotel,
Hancock and Brown again and then back to
port. - took both & arrived to go about 10:00 P.M.
about 10:00 P.M. - left on worked in hotel, then
drove to walk to Brown's home.  Brown's address was about a mile from hotel and
got wine Brown asked him say, "By gosh!"
I never heard you said that. Sir, we
men had had 67 coats washed now - and
that information. Mrs. did now'd tellig. "We're
quiet and we won't get into it, we'll have
noisy & noisy jewelry." Wife said to give it to
her. They said she was being most anxious
what seemed to ring, watch & money. But that
was his wife, wife, and then said, "Let me see
your daughter - Mrs. said it's time we
they were going across country for us to take
him along. asked him at St. I.
Port Huron and at St. Ignace and it was not
so we will come back & right time we made

Defendant's Exhibit AA)

Claim No. 4 - 40A Co. Conf. Ins. Amt. of Loss 3 450
 Policy No. IMW 62001
 Expires 6-2-40
 Total Amt. \$ 3950
 Form A.R.-Jr. F. 2

Broker Baige-
 Agent Boatwright

Holiday
Proof Instructions

Assured Sydney M. Williams & Elizabeth T. Williams
 Res. Address 3418 La. Sombra Dr., Ph. 4-2239
 Bus. Address alpha-G-1 Ph. 2-1111
 Occupation Business - Springboard - Good collection
 Date Lost 12/2/40 Location Salinas
 Item No. 1. One flat din. Watch with dia. bowl
at least containing 84 dia. + 26 top. \$ 350.00
 4. One din. bowl & bowl set
plate with 24 top. center + 24 filled dia.
dia. at 25cts. = 5cts. 100cts.
 5. One flat. dia. engagement ring
center stone 24cts. 3.5cts. also
containing 8 top. + 22 middle dia. - 188.00
 6. One gets of diamond mounting
seat 2 ct. center. 900.00

Appraised By E. M. Boatwright 6/2/39 Val. Est. \$ 3450

Purchased From John Baige

Reported 1/2/40 by Boatwright County

Remarks #5. Interiors

Reporting Instructions:

Defendant's Exhibit AA)

EXPENSE ACCOUNT

TELEGRAMS	TELEPHONE	MISC.
<hr/>		
12	Gmina	460V
		1/6 Petrol
		1/6 Total Gaddis
		1/6 R. via Street 55
<hr/> ADVERTISING <hr/>		
		2/3 7.50
		3/6 25 Cents 21 10
		1/1 6
<hr/> TRANSPORTATION <hr/>		
<hr/> ADJUSTMENT RECORD <hr/>		
DATE	TIME	AMOUNT

Defendant's Exhibit AA)

STATEMENT OF LOSS

8000 11-28 MAR

ATE..... By Phone, Letter Interview, *cont'd*

about 2 mi. or less., found a car driving at
terrific speed - Mr. Thompson was to, Brown told
them and called Mr. Brown and them to the
Police Dept. Spoke to police, - referred to the officer.

#1. - Person, - in 20 yrs.
stop short. -
Waded shore.
5' 6"
Afin.
Dark brown.
Light coat.
First lat. =
Very cool.
And English background.

#2. Person.
Wag. 20 +
Full face.
5' 6 or 7"
M. & S. - Starbuck.
Dark brown.
Very fat.
English - background.
Very cool.

Believed to be living 1936 liter. Dark blue or pink.
Also believed to be living up in interior
This dept. not certain.

(Testimony of Robert L. Reynolds)

Mr. Penney: We don't seem to have much in common, your Honor.

Q. By Mr. Davis: Mr. Reynolds, I will ask you if, on a certain occasion, Mr. Lewbel came to you, and, in order to direct your attention to the occasion, said something to you about Mr. and Mrs. Williams were having domestic trouble? A. Yes, he did.

Q. Do you recall approximately when that was?

A. Well, if I remember correctly, it was more than a [368] year after this claim was handled, because I had difficulty for a moment in placing the case in my mind when he mentioned it, and I had to dig out my file to find out what he was talking about.

Q. I will ask you if at that time Mr. Lewbel did not state to you that the Williams were having or were about to have a divorce trial, and there might be some fireworks, and some question might come up as to whether or not this robbery was real, and that he, Lewbel, didn't think there was anything to it, but, if anything came up, he would let you know? Did Mr. Lewbel make that statement to you, in substance or effect?

A. Those aren't his words, but, as I recall, he came to me and said that the Williams were having some domestic difficulty, and that there were being some charges and counter-charges made by the parties, which might develop into something of interest to the insurance company, and he thought that I ought to know about it. Well, at that time, it sounded like another one of those cases of

(Testimony of Robert L. Reynolds)

family squabbles, so I didn't pay much attention to it. But he advised me that he was going to be at least an interested spectator at these divorce proceedings, and if anything did develop of interest to the company he would keep me advised.

The Court: Did he mention anything about a fake holdup then, or a charge that there was or wasn't a fake hold-up?

A. I don't recall that the words "fake hold-up" were [369] used at all.

The Court: Or any other word synonymous with "fake"?

A. Yes; he told me that there were going to be statements made that made that hold-up questionable.

Q. By Mr. Davis: Did he ever give you any further information on that?

A. At that time Mr. Lewbel was in and out every few days, and he would pass a remark once in a while about the case, but I am unable to recall any time that he ever told me that anything particularly definite had been developed, and it was not until many months later that I learned that the insurance company was pressing a case on the matter.

Q. That is all that you were told about it?

A. Yes.

Mr. Davis: The defense rests. [370]



SYDNEY M. WILLIAMS,

having been heretofore duly sworn, upon being recalled in surrebuttal in his own behalf, testified as follows:

Direct Examination.

Q. By Mr. Penney: Mr. Williams, do you know an Edith Simpson? A. Yes, sir.

Q. Have you ever been at her home?

A. On several occasions.

Q. Did you ever meet Mrs. Berrenberg at her home?

A. To the best of my knowledge, I never saw this lady until she walked into this courtroom.

Q. Did you ever at any time take your wife over to her home and leave your wife in the car, and discuss your marital troubles with Mrs. Berrenberg? A. Never.

Mr. Penney: You may cross examine.

Cross-Examination.

Q. By Mr. Bledsoe: Mrs. Simpson is interested in metaphysics?

A. Not that I know of. She is in politics, as far as I know. She used to be out here at the jail.

Q. Do you remember seeing Mrs. Berrenberg at the Hall of Records some time after the divorce suit was filed? A. No.

Q. Do you ever remember her coming up to you and [371] telling you that Betty was in a bad way financially and you should help her out? A. No, sir.

Q. Are you certain you never did?

A. To the best of my knowledge, I have never seen that woman before she walked into the courtroom.

Q. Did you ever drive Betty to her home, to the best of your knowledge? A. Never, no, sir.

(Testimony of Sydney M. Williams)

The Court: What do you mean "to the best of your knowledge"—to the best of your recollection?

A. To the best of my recollection, yes, your Honor.

The Court: Do you mean by that that it is possible that you have met her and don't recall it to your mind at the moment? A. Yes.

The Court: Do you wish me to understand that you are testifying here positively that you did not meet her at Mrs. Simpson's home?

A. No, I couldn't do that. Casually I might have met her.

The Court: Your answer is that you don't remember having met her before?

A. That is correct. But I know definitely that I have never been to her home with Betty or anyone else.

The Court: You wish me to understand that you might [372] have met her, but you don't recall her?

A. No; I wouldn't say I never met her.

Mr. Penney: That is all.

The Court: By the way, perhaps all of counsel will want to object to his. I have here before me the file in the divorce trial in the Superior Court, No. D-198,085. I find in this file, on the pink sheet, a copy of the minute order in Judge Lindsey's Department 14, of October 24, 1940, in the case of Sydney M. Williams v. Elizabeth J. Williams, No. D-198,085, CCC 1432, "Order to show cause re attorneys' fees transferred from Department 8 comes on for hearing, with petition for conciliation." You filed a petition for conciliation in that matter, did you?

A. Yes, your Honor. I had a youngster. That was mine.

(Testimony of Sydney M. Williams)

The Court: "Plaintiff present with his attorney Robert Agins, and defendant with her attorney, S. S. Hahn. The matter is referred to Director of Conciliation Bates for findings of fact and recommendation. The court orders amicable settlement as agreed. The amount of \$400 now in the bank's hands is to be divided between them if agreeable to the bank. Wife is to turn over two diamonds belonging to husband forthwith. She is allowed to rent the home and live on the proceeds: File ordered sealed. Case continued to November 8, 1940, at 10:00 A. M."

You were present on the hearing referred to there, on October 14, 1940? [373] A. Yes.

The Court: Did you make an agreement to the effect that—well—the court orders amicable settlement as agreed. Did you come to an agreement with your wife separately or through her attorney?

A. Through the attorneys.

The Court: And part of that agreement was that the wife was to turn over two diamonds belonging to you?

A. Yes, sir.

The Court: Were those described under oath by anybody at that hearing, or was this an informal hearing?

A. They were described by me; I explained what they were.

The Court: Informally or under oath? This was a conciliation hearing conducted by—

A. Everybody was sworn. It was a regular hearing.

The Court: You described the diamonds, did you?

A. Yes, sir.

The Court: How did you describe them then?

A. The Elks pin and the diamond ring that I got from the gentleman that testified today, that was in this little green box, along with her wrist watch.

(Testimony of Sydney M. Williams)

The Court: That is the diamond you yourself testified to the other day, or Mrs. Williams said that you had had for some time?

A. The one I bought for Mickey. It isn't on the loss [374] at all. These two diamonds have nothing to do with the hold-up.

The Court: Just a minute. One of the two diamonds was the Elks pin?

A. That is right, and the other—

The Court: And the other one was a ring?

A. Yes.

The Court: Where is the ring?

A. She has it. The court ordered her to return it also; in Doyle's court it was mentioned again, but she didn't return it, and then I reduced it to a judgment, and we filed suit for claim and delivery and got a judgment from the court there, because she never obeyed the court order, and to this day she still has the Elks pin and that ring I bought for Mickey.

The Court: You have a money judgment for the Elks pin? A. Yes, your Honor.

The Court: On August 4, 1941—reading from the same file, No. D-198,085, *Sydney M. Williams vs. Elizabeth J. Williams*, there appears to be an affidavit signed Sydney M. Williams, August 4, 1941, before Aimee Schoff, and then the following appears. This is an affidavit for order to show cause *in re* contempt. "The court ordered defendant to return a diamond ring and an Elks diamond pin to plaintiff." Is that the same diamond ring?

A. Yes, it is. [375]

The Court: In any of these pleadings in this divorce suit was there any mention by either of you, in any papers

(Testimony of Sydney M. Williams)

you filed, by way of pleadings or affidavits or in oral testimony, of any other jewelry?

A. No, sir. And if I may—

The Court: There was not?

A. Not in the pleadings.

The Court: Pleadings, affidavits or testimony?

A. Yes, in testimony. It has nothing to do with this case, but Mrs. Williams testified that when she married me she had handfuls of diamonds, and that she sold those diamonds in order to put the money into Claudette, and the court made a finding that there were no such diamonds.

The Court: What do you mean by "put the money into Claudette"?

A. It was a company I owned. There was also testimony—

The Court: Just a moment. Were those diamonds specifically described in the testimony? A. No.

The Court: They were not?

A. No. They were described as this one girl got on the stand and said, "She showed me fistfuls of diamonds." That was the type of testimony.

The Court: I urge counsel for all parties not to hesitate to call my attention to any objection they might [376] have to this line of testimony.

Mr. Penney: I have none at all, your Honor.

The Court: There is also in this file an affidavit bearing the filing stamp of September 8, 1941, file No. D-198,085, Sydney M. Williams vs. Elizabeth J. Williams, on the title page of which appears as counsel proffering it for filing, the name Robert B. Agins, attorney at law, 6253 Hollywood Boulevard, Los Angeles, California, Hollywood 7305, attorney for plaintiff. Was Mr. Agins your attorney at that time? A. Yes, sir.

(Testimony of Sydney M. Williams)

The Court: Was he your attorney throughout the divorce proceeding? A. Yes, sir.

The Court: The document I have just referred to is entitled, "Affidavit in support of Motion for Return of Certain Personal Properties belonging to plaintiff"?

A. Yes, sir.

The Court: It appears to be an affidavit wherein the affiant is named as Esther A. Dominguez, and it is signed Esther A. Dominguez, and dated the 4th day of September, 1941, before Monte E. Livingston, notary public in and for the County of Los Angeles, and on the back, "Robert B. Agins," and it bears the indication that it was served on the 8th day of September, 1941, upon the attorney for the defendant, by the signature of S. W. Thompson, attorney for defendant. Now, I will ask you, did you ever read that [377] affidavit?

A. Yes, but the affidavit where it says—

The Court: Just a moment.

A. I read it the other day.

The Court: I call your attention to this particular part of it on page 1, line 20: "That your affiant further knows of her own knowledge that prior to the Interlocutory Decree of Divorce your affiant had cash—"

A. That is a different—

The Court: I understand. Esther Dominguez was your previous wife? A. Yes.

The Court: "That your affiant further knows of her own knowledge that prior to the Interlocutory Decree of Divorce your affiant had cash in the vault of your affiant and Sydney M. Williams in excess of \$5,000 and numerous diamonds, which your affiant had obtained during the said marriage in lieu of attorney's fees and by purchase."

(Testimony of Sydney M. Williams)

A. That is referring to those Rosenthal diamonds that I had.

The Court: Just a moment. Just a moment. Did you know about this affidavit before it was filed?

A. Yes.

The Court: So today was not the first time you had read it?

A. No, I read it to counsel today. [378]

The Court: That was the first time counsel had seen it? A. That is right.

The Court: The diamonds referred to in this affidavit, if you know, were they the diamonds that are described in the plaintiff's complaint? Did it include those diamonds?

A. Yes, your Honor.

The Court: The Elks pin? A. No.

The Court: It didn't include the Elks pin?

A. No. It included the watch and the 3-carat stone. Yes, the Elks pin.

The Court: The 3-carat stone?

A. I was wearing that.

The Court: The point I am particularly calling your attention to now, counsel, is, "That your affiant further knows of her own knowledge that prior to the Interlocutory Decree of Divorce"—and, as you have indicated, that was an interlocutory decree of divorce between yourself and the person who, at the time this affidavit was made, was named as Esther Dominguez, prior to December 31, 1938. With that in mind, I will now ask you—"affiant knows of her own knowledge that prior to the Interlocutory Decree of Divorce"—prior to December 31, 1938—"your affiant had cash in the vault of your affiant and Sydney M. Williams in excess of \$5,000 and numerous

(Testimony of Sydney M. Williams)

diamonds." Does this testimony show that you acquired diamonds mentioned in the plaintiff's [379] complaint—Did those include these diamonds and the numerous diamonds—

A. In 1936 I got those diamonds.

The Court: All of these diamonds?

A. In 1936 I got a diamond wrist watch in that deal—I will tell you—in 1936, from Max Rosenthal.

The Court: You got all these diamonds before December 31, 1938?

A. I will tell you what I did have. The pin, the Elks pin, the ring I wore—

The Court: That is No. 6 on the list?

A. That is right, your Honor; No. 1 on the list, and No. 5 on the list, as I testified, I got from Max Rosenthal on that deal.

The Court: The numerous diamonds referred to does not include the platinum diamond wedding ring or the diamond wedding ring or the diamond bracelet?

A. No, sir.

The Court: I have no other questions.

Mr. Penney: Just a moment. I have a few questions.

The Witness: Your Honor, I don't want to speak out of turn, but I want to—

The Court: No. You have got a pretty good lawyer here.

The Witness: May I talk with him a moment?

The Court: If you wish to consult with him, you may have that opportunity. Suppose you be seated over there, [380] and, if I may, I will interrupt the proceedings for a moment here with an *ex parte* matter.

(Short intermission for *ex parte* matter.)

(Testimony of Sydney M. Williams)

Redirect Examination.

Q. By Mr. Penney: Mr. Williams, the court has interrogated you in regard to an affidavit that was filed by Esther Dominguez. Will you explain now what the purpose of filing that affidavit in the divorce action was?

A. Yes. Mrs. Williams, that is, Elizabeth Williams, had made claim that certain of this property was her separate property, not community property, and the purpose of that affidavit—

Q. Tell us the purpose of the affidavit.

A. The purpose of the affidavit—

Mr. Davis: I am going to object to it as immaterial. The affidavit speaks for itself.

The Court: It is in support of an order to show cause. I have been practicing law for almost 30 years, and if you want to put it in the record for the benefit of the members of the Circuit Court of Appeals, they might appreciate it. Maybe they might need it more than I do.

Q. By Mr. Penney: Mr. Williams, in any of the proceedings against Mrs. Williams, have you ever made any threat against her for any other jewelry containing diamonds, other than the diamond ring which you bought for Mickey and the Elks pin, which contained diamonds?

[381]

A. No, sir, never.

Mr. Penney: That is all.

Recross Examination.

Q. By Mr. Bledsoe: The Elks pin had five large diamonds on it? A. One on each antler.

The Court: How many antlers—five?

A. Five, I think. I think there are five on an Elks pin.

(Testimony of Sydney M. Williams)

Q. By Mr. Bledsoe: What was the size of it?

A. It was a large one.

Q. What was the size of the stones?

A. I would say they were about a quarter carat apiece.

Q. Five large stones? A. That is large.

Q. Quarter carat?

A. On a pin; I would say so, on an Elks pin.

The Court: Was it encrusted with diamonds?

A. No—solid platinum mounting.

The Court: Those were the only diamonds?

A. That is right.

The Court: Have you examined Plaintiff's Exhibit No. 7 here, the watch, and No. 8, the ring?

A. When I was on the stand I looked at them, yes.

The Court: Have you examined them since the recess?

A. No, sir. [382]

The Court: You have not? A. No, sir.

The Court: Have you finished?

Mr. Bledsoe: I would like to suggest one more question.

Q. Where did the court make the finding you have referred to that Mrs. Williams had no diamonds which were sold to put into Claudette?

A. When the court made its—started to sum up the case.

Q. Orally?

A. Yes. And we had a transcript of it made up, some place.

Q. Have you got it?

A. I don't have it right here.

Q. Not a finding of fact?

(Testimony of Sydney M. Williams)

A. No. It was taken down, however, by the reporter. The reporter has it, and we ordered that part of it written up, and we have it some place.

Q. Isn't it a fact that when you were in the Conciliation Court, that you spoke privately to Mrs. Bates before Mrs. Williams was called in there?

A. No, sir. To the best of my knowledge, she called counsel and myself in first, and then called her in.

Q. Did you tell Mrs. Bates that Mrs. Williams had a 3-carat unmounted stone and a 2-carat unmounted stone?

A. Certainly not. [383]

Q. Did you request her to make an order that they be returned as your property?

A. Certainly not. After she said she had taken them out of this little green box, the order was made for her to return them.

The Court: Return what?

A. The pin and the ring.

The Court: He was talking about a 3-carat stone unmounted.

A. And I told him that was not said. May I correct that? What I mean, the Elks pin and the ring I got for Mickey is what was described there and what she was ordered to return.

Q. By Mr. Bledsoe: The ring you were wearing, covered in the proof of loss, the ring you were wearing was practically two carats? A. That is right.

Q. What was the size of the ring you bought for Mickey?

A. I would say that was about a carat, probably a carat and a fifth.

(Testimony of Sydney M. Williams)

Q. Didn't you tell us previously here that it was less than a carat? A. No.

Q. Didn't you say it was a small man's ring and you put it away for your boy? [384]

A. It was a ring around a carat. I never measured the stone. I told you I took it down to Mr. Laykin and he told me if I would drop it on the counter he would give me \$400 for it.

Q. Was it as large as the stone you say you were wearing at the time of the alleged hold-up?

A. No, sir, it wasn't near as large.

Q. It wasn't a two-carat diamond?

A. No, sir.

Q. At the time you filed the affidavit with the court in the divorce suit, did you list any separate property?

A. Yes.

Q. Did you list this Elks emblem with the five diamonds or the man's ring, as part of your property?

A. I don't remember if I did or not.

Q. I show you an affidavit filed October 24, 1940, in the Superior Court case, No. D-198-085, and ask you to show us where you claim to have owned two diamonds, two rings, one ring with emeralds, as your personal property?

A. On this you have just showed me, it is not on here. However, later on in the case it is.

The Court: Will you find that? A. Yes.

The Court: I found the order where they ordered the return of the diamond pin and the ring, but he is speaking now of an affidavit or something sworn to by you. [385]

The Witness: That you read a short while ago, where I was applying for a contempt order, where I set forth the Elks pin and the ring.

(Testimony of Sydney M. Williams)

The Court: That is the only other one, but there is no affidavit listing that as part of the inventory of your separate property?

A. No. There are probably some other things here too.

Q. By Mr. Bledsoe: Later on, in the civil suit, in the case you filed against Elizabeth, didn't you testify that the man's ring was a 90-point carat diamond ring?

A. No. By 90 points—100 points is a carat.

Q. Wasn't it a 90-point diamond ring?

A. It was about a carat; that is all I know. I did not measure it. I never had it measured. Mr. Laykin told me it was approximately a carat. It was never measured. It could have been under or over. It depended on how deep it was. I don't know.

Q. Then if the ring which you purchased from Mr. Marcin for \$250 was almost two carats, that would not be the ring you are referring to there?

Mr. Penney: I am going to object, your Honor.

The Court: Referring to "there"—I don't know what "there" is.

Q. By Mr. Bledsoe: The ring you have been referring to.

The Court: In the claim and delivery suit? Let's see the file. [386]

The Witness: I am definitely referring to the ring I bought for Mickey.

Mr. Penney: May I interpose an objection, on the ground that the question is assuming parts of things other witnesses testified to and trying to put them in the mouth of this witness, and framing the question on that theory, and I am going to object to the form of the question as being improper.

(Testimony of Sydney M. Williams)

The Court: He has a right to assume all or any portion of anything that has been testified to.

The Witness: What is the question?

Mr. Bledsoe: I think you answered it.

The Witness: I said I definitely referred in both lawsuits to the ring I got for Mickey and to the Elks pin.

Q. But the ring you got for Mickey was not a ring over two carats?

A. It was not. No. 6 was a 2-carat ring I have had since 1928, counsel.

Mr. Bledsoe: That is all.

Mr. Taylor: I desire to call Mrs. Williams.

The Court: That is all your rebuttal?

Mr. Penney: Yes, your Honor.

The Court: You now rest again?

Mr. Penney: We rest the second time. [387]

ELIZABETH J. WILLIAMS,

a witness heretofore duly sworn, upon being recalled, testified as follows:

Direct Examination.

Q. By Mr. Taylor: Mrs. Williams, calling your attention to Plaintiff's Exhibit 7, state whether or not you at any time placed any identifying mark on that wrist watch?

Mr. Penney: To which I object as not being surrebuttal. A. Yes, sir.

The Court: That is correct. It is not. It is new matter, but nobody testified to it.

(Testimony of Elizabeth J. Williams)

Q. By Mr. Taylor: Mrs. Williams, were you present at the conciliation hearing referred to a few minutes ago by both his Honor and Mr. Williams?

A. Yes, sir.

Q. Do you recall mention of two items of jewelry?

A. Yes, I remember it.

Q. Will you relate the two items of jewelry that were referred to in that particular conciliation hearing?

A. Two uncut stones.

Q. What size stones?

A. Two-carat and three-carat.

The Court: Did you mention them?

A. No, sir.

The Court: Who did?

A. Mrs. Bates mentioned them. [388]

The Court: Mentioned them to you?

A. Yes, sir.

Q. By Mr. Taylor: Let me ask you this: Did you and Mr. Williams go into the conciliation hearing together? A. No, sir.

Q. Who went in first? A. Mr. Williams.

Q. And then you went in? A. Yes, sir.

Q. Who brought up the subject of the two stones you are referring to?

Mr. Penney: I am going to have to object to this, because I don't want to be bound by something Mrs. Bates stated.

Q. By Mr. Taylor: Was Mr. Williams present when you were in there with Mrs. Bates?

A. Not when I first went in.

Q. Subsequently did Mr. Williams and counsel come into the meeting? A. Yes.

(Testimony of Elizabeth J. Williams)

Q. State whether or not at that time there was any conversation relative to the two uncut stones?

A. There was.

Q. In Mr. Williams' presence? A. Yes.

Q. Relate the conversation. [389]

A. When I first went in, Mrs. Bates said, "What do you mean—"

Q. This was when Mr. Williams was present?

A. No—before he came in.

Q. Let us confine the conversation to when Mr. Williams was present.

A. Mrs. Bates asked me to return the two-carat and the three-carat uncut stones to Mr. Williams.

Q. Did you agree to do it? A. No, sir.

Q. Was there anything else said relative to this particular subject?

The Court: Did you tell her you wouldn't agree to it?

A. I couldn't tell her I had them, your Honor, because they were involved in this robbery.

The Court: Did you say you wouldn't do it?

A. I told her I didn't have them, and then they later took me into Mr. Doyle's court.

Q. By Mr. Taylor: Have you told us all the conversation, as far as you remember what you and what Mr. Williams said, if anything, with reference to the two uncut stones?

A. That is about all. And we discussed about my getting the house.

Q. Did you appear subsequently in Commissioner Doyle's court? A. Yes, I did. [390]

Q. Was Mr. Williams also present in court at that time? A. And also Mr. Lewbel.

(Testimony of Elizabeth J. Williams)

Q. Did you testify in that hearing?

A. Well, yes, I did.

Q. Did Mr. Williams testify?

A. We were all at the table. I didn't get on the stand.

Q. Relate, as far as you can recall, what was said at that particular hearing with reference to the uncut stones, if anything.

A. Mr. Williams wanted me to return a 3-carat uncut stone and a 2-carat. The 2-carat wasn't mentioned so much, but it was the 3-carat.

Q. I am sorry I referred to uncut stones.

A. Unset.

Q. I believe as I framed the question I said uncut stones. What I really meant was unset. You are now referring to a 3-carat unmounted stone; is that right?

A. Yes, sir.

Q. Go ahead and relate what was said.

A. And I told Mr. Doyle I could not return them, because they were the stones that figured in the robbery. And Mr. Lewbel was there, and Mr. Williams was there, and Mr. Thompson said, "Why haven't you told me this before?" And Mr. Williams jumped up and said, "I will go to the [391] District Attorney's office about this," and that was—well, anyway, in a couple of days Mr. Lewbel went to the insurance company and reported it. Mr. Lewbel testified yesterday that he was there.

Q. Have you related everything, as far as the testimony was concerned at that hearing, relative to these unmounted stones? A. Yes, sir.

Mr. Taylor: I have no further questions.

(Testimony of Elizabeth J. Williams)

Mr. Penney: Whose turn is it?

The Court: I think it is anybody's turn, whoever gets to the lectern first.

Cross Examination.

Q. By Mr. Penney: You were under oath in that Doyle court, weren't you?

A. No, I don't believe I was. We were at the table. He had taken me in court.

Q. Didn't you swear to tell the truth, the whole truth and nothing but the truth at the hearing in Mr. Doyle's court?

A. No, I wasn't put on the witness stand at all. I don't remember being sworn in at all.

Q. But you told Mr. Doyle that you couldn't return the 2-carat stone, because that had been taken on the robbery, didn't you? A. A 3-carat stone.

Q. Because it had been taken in the robbery? [392]

A. I said it figured in the robbery.

Q. And that you didn't have it?

A. I couldn't return it. How could I return it? I would have involved myself and Mr. Williams and everybody.

The Court: Did you have the stone at that time?

A. No, not at that time, I didn't have it.

The Court: You didn't have it?

A. No. That was after the suit for divorce and after the stones were taken.

The Court: You mean taken through the panel of the door that was cut out? A. Yes.

* * * * *

The Court: Do you have any other witnesses?

Mr. Penney: No, your Honor.

The Court: Go ahead.

Mr. Penney: I think that is all. [393]

* * * * *

The Court: It has been very difficult to know who to believe in this case, but I think the plaintiff is entitled to judgment. I am not satisfied, after listening to all of the testimony and all of the witnesses. Every case always leaves something wanting. But I am not satisfied that the defendant Sydney Williams actually suffered a hold-up. In other words, I believe he did not suffer a hold-up, and that the claim presented to the insurance company was a false claim and was fraudulently made.

It being late, I will not attempt to analyze the evidence nor the testimony of the witnesses. The question arises in my mind as to just who this judgment should be against. There isn't any cross complaint or any pleading of that kind. Between the two defendants here, is the plaintiff entitled to judgment against both defendants for the total amount, or is the plaintiff entitled to judgment against Mrs. Williams for the ring and the watch that she has in her possession? Has there been an adjudication that they belong to her? [395]

Mr. Davis: No, there has not, your Honor. I think we are entitled to judgment against both of them. We are not claiming the watch, because we obviously can't claim the watch.

The Court: I am talking about the watch which is in evidence here, item No. 1 on your list.

Mr. Davis: That watch was delivered to us by Mr. Taylor, and was not given to us, and we have no understanding about it.

The Court: Is it in issue in this case? Do you have title to that watch?

Mr. Davis: No, I don't think it is. It is simply evidence in court at the present time.

The Court: I know it is simply an exhibit in the court, but you are claiming a judgment here, and, quite obviously, Mr. Williams has testified under oath here, and in the divorce case it was stipulated that he so testified, and it appears from the affidavit which was made here that all of this property was his separate property. If it is his separate property, and he secured a money judgment, obviously Mrs. Williams should not have a judgment against her for the total amount in this case.

Mr. Davis: That is true. I thought your Honor was asking my opinion on the other.

The Court: I am asking counsel their opinion on the matter of the platinum watch and the diamond friendship ring [396] which she has and has had in her possession.

Mr. Taylor: That is true. However, I call attention of the court to the fact that the testimony is undisputed that Mrs. Williams claims she so testified, that she did not receive any of the \$4,250, and I don't believe there is any evidence to contradict her.

The Court: She endorsed the check.

Mr. Taylor: She endorsed the check and testified she gave the money to Mr. Williams.

The Court: I don't think the issue is properly raised so as to permit a divisible judgment here. I think it might have been raised by a special defense in the answer. Accordingly, the judgment will be in the form prayed for against both defendants, Sydney Williams and Elizabeth Williams.

* * * * *

[Endorsed]: Filed Mar. 7, 1945. [397]

[Title of District Court and Cause.]

Hon. Peirson M. Hall, Judge Presiding.

REPORTER'S TRANSCRIPT OF MOTION FOR
NEW TRIAL.

Appearances:

Messrs. Hindman & Davis, by
Eugene Davis, Esq., and
Huntington P. Bledsoe, Esq.,
For Plaintiff.

George Penney, Esq.,
For Defendant Sydney M. Williams.

* * * * *

The Clerk: No. 2738-PH-Civil. Hearing on motion
for a new trial.

Mr. Penney: Your Honor, I have subpoenaed Mr. Ganahl and Mr. Greenbaum in court. I prepared a memorandum brief on the question as to whether or not the testimony is privy, and I think if the preliminary facts are brought out the court will agree with me there has been a waiver of privy. I would like to put them on if the court will permit me to do so.

Mr. Bledsoe: I think it is proper to argue the motion first. We haven't received any points and authorities. It might be a mistake on the part of counsel. We waited until yesterday to prepare counter points and authorities upon this motion. I have some here which I would like to file at this time if I may. We haven't received any points and authorities from the moving party, however.

Mr. Penney: I am sorry I overlooked it, your Honor.

The Court: You may file them now.

Mr. Davis: If I may address the court, we have three of us on our feet now.

The Court: That is good.

Mr. Davis: I just talked with Mr. Taylor's secretary and asked her if he was coming up, and she said he got a [2] call last night that his mother was critically ill in Berkeley and he had to leave, and he didn't tell her anything about this case.

The Court: Let me see, I have forgotten who Taylor is.

Mr. Davis: Taylor was representing the other defendant.

Mr. Penney: I discussed the matter with Mr. Taylor, I gave him copies of all affidavits, I saw him twice since then, and he has advised me on both occasions that he didn't intend to come up and make any further appearance in this matter.

Mr. Davis: That is not my advice, but I don't say you didn't get your advice.

The Court: Mr. Ganahl and Mr. Greenbaum are members of the bar and had been consulted by whom?

Mr. Penney: By Mrs. Williams.

The Court: Mrs. Williams?

Mr. Penney: That's right.

Mr. Bledsoe: If the court please, I don't know what they would testify to, but it seems an attempt to impeach one of the co-defendants, one of the witnesses, and we have cited some authorities that that is not proper at this time, if that is the purpose of it. I don't know what other purpose it could have. Mr. Penney does not state in his affidavit what they will testify to, or whether it will be impeaching, corroborating, or what it might be.

Mr. Penney: I think the court can appreciate the [3] unfortunate position I was in in this case, consulting with two attorneys, both of whom felt that in justice to themselves they shouldn't make an affidavit.

The Court: I can see that, but the point is this: There is no showing here that neither one of them or either of them was not available for the service of process of this court during the time of trial. They both reside in Los Angeles and have their offices here. There is no showing of any diligence beforehand, so that no matter what they might testify to I doubt the propriety to taking such testimony, or their sworn statements at this time.

If, for instance, it came as a matter of complete surprise, or if it came as a matter involving their absence or their unavailability, perhaps that might put a different complexion on the matter.

Mr. Penney: Your Honor, may I call your attention to the fact that on the 10th day of December was the first time that we were given the opportunity of examining her under oath, and at that time—

The Court: Was that the deposition?

Mr. Penney: That's right, that was the deposition. At that time, your Honor, she denied specifically making any disclosures to anyone except Mr. Taylor and to Pinky Thompson. That was the 10th of December. I had no way of knowing until later on, when I attempted to find out who the assistant of Pinky Thompson was, I then ascertained that she had consulted [4] Mr. Greenbaum, a fact which she denies in her deposition. She says she made no disclosure to anyone except to three parties. Now, how am I going to refute that situation? I am helpless.

Mr. Bledsoe: Could I reply? By counsel's own statement he has shown this is impeaching testimony. I assume he wants to show that one of the co-defendants made a statement to either one of the two counsel, either that there was or was not a robbery.

Now, as shown by the affidavit, he could have taken the deposition of the co-defendant had he so desired, that is, defendant Williams, for approximately a year. It wasn't done.

And as also shown here, on Sunday morning after he had heard what she had to say, he had plenty of opportunity, the defendant did, to interview these people. I talked to all of them except attorney Ganahl, as shown by my affidavit, and I had no difficulty whatsoever; so there isn't any element of newly-discovered evidence or diligence. In fact, impeaching evidence is not newly-discovered evidence.

And, further, as shown by our points and authorities if the plaintiff proves the allegations contained in its complaint, which the plaintiff did in this case, then there can be no surprise if the plaintiff proves what they allege the facts to be, and that is what we attempted to do here.

Furthermore, this evidence is evidence by a co-defendant [5] who was called under the court rule as an adverse witness under cross-examination, and we may or may not be bound by all of her testimony. The testimony, of course, favorable to the plaintiff can be considered by the court. The court can disregard any impeaching statements if she did make any, and I don't know as far as this co-defendant is concerned.

Furthermore, this would be impeachment upon an immaterial matter. It does not make any difference whether she did or did not tell either of these attorneys in a con-

fidential disclosure to them whether or not there was or was not a robbery. We know and she has testified that she hid the fact there was a robbery for a long time until they became involved in a divorce action, and then, naturally, as happens in all these cases she made a disclosure, and that is the only manner in which these matters that are so secretive are ever disclosed.

Mr. Penney: This involves the integrity of a member of the bar, and I don't think this court wants to have a fraud perpetrated upon him, and I am satisfied from the information which these men have given to me that if their story is told here I think that this court would come to a different conclusion, and I don't think in a matter of this kind that a man should be deprived of his right to practice law, and that is what this means, upon this testimony, if it is false testimony.

The Court: Well, the witness Elizabeth Williams [6] admitted on the witness stand that she made a false oath, she made a false oath in connection with the loss of the jewelry originally, and as I recall, that she repeatedly stated to different people that there had been a robbery, and made representations to that effect. So the testimony of the witness Elizabeth J. Williams was, naturally, received with caution, and I don't know that it would make much difference, even if it should be proven that she made other prior inconsistent statements to other people, because she has already admitted on the stand that she made a false oath, that she and her husband together did. Had there been no corroboration, I mean such as there was in this case, circumstantial corroboration of her story, it would not have been worthy of a great deal of credence.

Mr. Penney: I am satisfied, your Honor, if you will permit this evidence to go on, that it is most material.

As I say, I have been handicapped at all times. I stated in my affidavit, and it hasn't been denied, that I used all the diligence that it was possible for me to use to get this woman in for a deposition, and I was never able to do it until the 10th day of December. I knew nothing at all about Greenbaum, I knew nothing at all about Ganahl, I discovered that later on, and if the story which she has told them can be related on the stand—

The Court: How do you know what she told them?

Mr. Penney: I don't, your Honor, except I have been [7] advised by them if they are permitted to tell their story here that it would materially affect the story which she told the court here when she was called.

The Court: Has the transcript been written up in this matter?

Mr. Penney: Yes, your Honor.

The Court: The original doesn't appear to be filed. Yes, it is.

Mr. Bledsoe: There is nothing in the deposition of the co-defendant that would have led Mr. Penney to contact either Mr. Greenbaum or Mr. Ganahl; but for some reason or other, after the trial, as in all of this type of motion, after the trial they sit down—

The Court: That is the only time you make a motion for a new trial.

Mr. Bledsoe: I am talking about newly-discovered evidence. They sit down and think of a lot of things they should have asked the witness.

"We have affidavits," or they could have seen so and so, and they want a new trial.

Now, if it were possible to keep on calling witnesses, I don't know when there would ever be an end to a trial.

I assume from what Mr. Penney has said that these two attorneys have already disclosed to him information. Whether or not it is confidential, I don't know. We are not in a position, of course, to raise the question of privilege, [8] because that is one which is personal to the co-defendant. She isn't here and her attorney is not here, and they have not made a motion for a new trial. If the court holds as a matter of law that privilege has been waived, then, of course, these attorneys can get up and state everything a client of theirs that has come into their office has told them; but still it would only be impeachment.

The Court: Mr. Penney, at this time I don't think I want to pass upon the question as to whether or not I should hear their testimony and make a determination that the privilege has been waived.

I am doubtful whether or not it would make a material difference, anyhow.

So if you will present any other points that you have in connection with your motion for a new trial, I would like to have you do so at this time.

I appreciate the compliment that both counsel paid to me in filing a ten-page memorandum on one side and a seven-page memorandum on the other, in that that presupposes that I know all about everything and that you merely have to put it in the record.

Mr. Penney: Then can we excuse the two witnesses at this time, your Honor?

The Court: I think so.

Mr. Penney: Your Honor, to begin with, we sometimes try our cases better afterwards than we do during the course [9] of the trial. There have been a good many things, perhaps, that I overlooked, but there is one thing

in particular, however, and that is the physical evidence in this case.

Since the trial I have had occasion to check these two articles that were offered here, and neither of those two articles complies with the description in the complaint itself. The watch is 22 diamonds short of the description. That calls for 86 diamonds. This watch here has but 64.

The ring calls for 14 small diamonds, and this ring here has but 12.

The Court: I think that was noticed during the trial and was commented on, if I remember. Somebody counted them. I know I counted them at the time, and there was some question about it. As I remember, there was some examination of a witness as to the difference.

Mr. Penney: If there is, I don't find it in the record, your Honor.

The Court: I may be in error on that, but I remember the question being brought up and discussed at the time of the trial.

Mr. Penney: I recall the discussion with regard to the ring, and I think Mr. Williams was asked whether or not he could count them, and he said without a glass he didn't know, but he thought there were but 12 diamonds in the ring.

So far as the watch is concerned and the bracelet on the watch, I didn't count those until after the trial and [10] discovered there were 22 short.

Maybe the court did that. If you did, you did it on your own, but so far as I was concerned I had overlooked it. Your Honor, if I may go over some of this evidence and call the court's attention to some of the discrepancies. I want to direct your attention, first, to page 35, and that

was the question of the conversation leading up to this robbery. She states on page 35 as follows:

"The Court: You said you had some conversation with your husband before you left Los Angeles about the trip to Mexico. What was supposed to happen?

"A—A robbery.

"The Court: That was before you left Los Angeles?

"A—Yes.

"The Court: What was said? Whose idea was it? Was it your idea?

"A—No. It was Mr. Williams'. He wanted the money to play the market.

"Q—What did he say to you?

"A—He came home and told me that he wanted to collect the money on the diamonds, because he needed it in the market.

"Q—What did you say?

"A—Well, I don't recall just exactly what I said.

"Q—Well, the substance of what you said? Nobody remembers exactly what they said, or very seldom, anyway.

"A—We just talked, and he said he needed the money, [11] and that if the market went up he would pay it back, he would make it right with the insurance company.

"The Court: When did this idea come out about the robbery? Did he say he had it all planned?

"A—He had been talking about it a couple of weeks."

Now, your Honor, on the 10th, just two days before that, here is what she had to say about that.

The Court: That is in her deposition?

Mr. Penney: That's right.

The Court: What page?

Mr. Penney: It starts on the bottom of page 3, but the material matter is on page 4 on line 15.

"Q—When was the matter first mentioned to you?

"A—Two days before he went to Calexico.

"Q—Here in Los Angeles?

"A—Yes."

Now, the court will recall this strange testimony about him and her being in Burbank one night, and out of a clear sky—that was testified here—she said that he mentioned to her, "This would be a good place for a robbery," and she says that occurred two weeks before, and they laid plans, and two days before they went to Calexico they went out here and purchased this ring for \$1.95 or \$2.95.

In one place she says they talked about it for two weeks, and on the 10th she says the first time it was mentioned was two days before. [12]

Again, on page 28, your Honor.

The Court: Of the deposition?

Mr. Penney: No; of the transcript. I was interested very much in going over this to find out what she testified to in regard to the jewelry they took down there. She says here:

"Q—When did you arrive in Calexico on December 31st?

"A—It would be the day before.

"Q—Did you take any jewelry there on the day before?"

The Court: What line are you reading from?

Mr. Penney: Page 28.

The Court: All right.

Mr. Penney: "A—No, sir.

"Q—Of any kind?

"A—I don't recall whether I took my cigarette case or not.

"Q—Did you wear any jewelry down there?

"A—No diamonds.

"Q—Did you wear any jewelry of any kind?

"A—Yes; I wore a ring.

"Q—Will you describe that ring?

"A—It was a ring we had bought at a Chinese store on Hollywood Boulevard."

And then she goes on and testifies she paid \$1.95 for it. I beg your pardon. Then they went on further:

"Q—And that was all the jewelry you had with you?

[13]

"A—No. Mr. Williams had his wrist watch."

Those are the only two articles she testified to under examination by Mr. Davis, except on page 60 these questions:—

The Court: Page what?

Mr. Penney: Page 60.

The Court: Of what?

Mr. Penney: Of the transcript, your Honor. Mr. Davis says:

"And, as a result, you were interviewed by myself and Mr. McAnally?

"A—Yes, sir.

"Q—And you told the same story you are telling here now?

"A—Yes, sir.

"Q—At the time you were in Calexico you were wearing your wedding ring?

"A—Yes, sir."

Again, your Honor, on page 9 of the deposition there is confusion in her mind in regard to this *Leach* matter, as to when she went down there to *Leach* and who made the suggestion. It starts on line 24:

"Q—Did you make the arrangements to go to Mr. *Leach*'s, or did Mr. Williams make the arrangements to go to Mr. *Leach*'s, or do you know?"

"A—*Mr. Leach*, or between Mr. Williams and myself?"

"Q—Well, I am speaking now about the occasion when you [14] went to San Diego in May or June of 1940, to dismount this jewelry.

"A—Yes, Mr. Williams called me from his office and told me we were going to San Diego.

"Q—And what else did he tell you, if anything?"

"A—Why, we were going.

"Q—To dismount the jewelry?

"A—Yes.

"Q—Break it up?

"A—Yes, sir."

Now, your Honor, I gather from this that Mr. Williams evidently knew *Mr. Leach*, called her up from the office and told her what they were going to do. They weren't living together at that time. Before the court, however, at the time of the trial—I am reading now from page 48—when he calls her up he tells her exactly what he is going to do. On line 23, they have been talking about living apart, talking about closing his office:

When was it closed?

"A—The first part of 1939. And he came up to the house and said we were going to have the diamonds broken up.

"Q—By Mr. Davis: Did he state why?"

"A—No, I don't think so."

"Q—To dispose of them or sell the stones, or anything of that kind?

"A—I don't know what reason he had for breaking them [15] up.

"The Court: He didn't say?

"A—No.

"Q—By Mr. Davis: He said they had to be broken up?

"A—Yes, sir.

"Q—What was done? How were they to be broken up, or who would break them up?

"A—He didn't know anybody, and he asked about Mr. *Leach's* laboratory in San Diego."

The Court: I think later Mr. Williams testified from the stand that he had met *Leach* before.

Mr. Penney: That's right. He had met *Leach*, but he never went down to San Diego.

There is confusion in the transcript here as to what was done. You remember the story she told. He took some two by fours, and with a chisel or with a screwdriver and a hammer he hollowed out two places in two two by fours, and he places this jewelry in a handkerchief and he puts it in one of the holes, and he covers it with plaster of Paris. There is only one handkerchief and there are two holes, and you cover it with plaster of Paris and nail that together. In the course of the trial we went into some detail about that. I said:

"Q—How big a hole did Mr. Williams carve in these two by fours?

"A—Well, I can't tell you exactly, but I imagine [16] about an inch deep.

"Q—And he did that with what?

"A—A screwdriver and a hammer, and I believe a small chisel.

"Q—He took the jewelry and placed it in the opening of the two by fours; is that right?"

and she goes on and describes it, and then I said to her:

"Q—You saw him cut two holes in these boards?

"A—Yes; I was in and out of the room, and I saw him."

On page 217:

"Q—Mrs. Williams, after this jewelry was broken up and put in this hiding place, whether it was under a board or in a box, was it all put in there together?"

I have skipped one here, your Honor.

The Court: She is talking about the box here now.

Mr. Penney: I skipped one here, your Honor. The court will remember she told that when they got back they put it under a board, and then they finally put it in a box. She testifies here in the last portion I read she was in and out of the room.

The Court: What page is that?

Mr. Penney: The last one I read to your Honor was on page 193 and 194. On page 41 she had described what he did with that, under direct examination by Mr. Davis:

"Q—Did you see him put them there?

"A—I was in bed, but I knew what he was doing." [17]

In one place she is in and out of the room; the next place she is in bed but she knew what he was doing.

Your Honor, to my mind that is one of the most fantastic things that I can imagine a man doing. Why he would take the trouble to take two two by fours and cut them out and put the jewelry in there, I would say would cast some suspicion on the story; and when she tells two different theories of that, one that she wasn't there, and the next time she was in and out of the room, I would say that the story doesn't ring true.

On page 217 we go into a very strange phase of this case.

The Court: As I read her testimony there on page 41, that is a continuation of the idea that he put the diamonds in the handkerchief and put them in there and put plaster of Paris on top of them to hold them in, on page 40. And there is a lot about a drink of water.

"Q—Where did he get the boards, do you know?

"A—From an unfinished room off of our dressing room.

"Q—After he had done the chiseling and put the plaster of Paris on it, what did he do?

"A—He put two nails in it, one on each end of the board.

"Q—Then what did he do with the result?

"A—He put them in the unfinished room that I was speaking of, off of my dressing room.

"Q—Were there any other boards in there? [18]

"A—It is an unfinished room, and little pieces of board were left back there.

"Q—Did you see him put them there?

"A—I was in bed, but I knew what he was doing."

That is perfectly consistent. That question was she was not there when he threw the two by fours back into the attic, or whatever it was. That is the way I read that.

Mr. Penney: Maybe I put the wrong interpretation on that, your Honor.

The Court: After all, you are an advocate.

Mr. Penney: That is rather questionable at times, your Honor.

Your Honor, when they returned from this trip to San Diego, the court will recall that according to her testi-

mony there were two pieces of jewelry that were not broken up, a ring and a watch. And if there is any confusion at all in the mind of this woman, it certainly is confusing to read what happened to that ring and that watch. On page 217. I will go back far enough now to get the continuity:

"Q—Mrs. Williams after this jewelry was broken up and put in this hiding place, whether it was under a board or in a box, was it all put in there together?

"A—At that time, yes.

"Q—Every bit of the jewelry that is involved in this litigation here was put there; is that right?

"A—Yes, sir." [19]

The Court: That is when she came back from San Diego?

Mr. Penney: That's right.

"Q—And you were worried about it?

"The Court: Did you understand the question?

"A—All the jewelry that was in the robbery was put in the box.

"The Court: Was put in the box after you came back from San Diego?

"A—Yes, sir. The unmounted stones, the rings and the watch were put in the box.

"Q By Mr. Penney: All put in together?

"A—Yes, sir.

"Q—And you remained there until when?

"A—Not so long. He took the ring and the watch out."

Now, on page 221. Remember, she took a trip, was gone a month, and came back sometime in August as nearly as she can remember it. That is on line 16.

"The Court: You took the ring and watch with you?

"A—No, I didn't. I put them up in the maid's room.

"The Court: While you were in the east?

"A—After I came back."

On page 239. The court was a little confused about this situation, and he asked her:

"The Court: It isn't clear in my mind when you took out the watch and the ring.

"A—Right after I came back from San Diego. [20]

"The Court: And you left them in the dressing room when you were east?

"A—in the bedroom.

"The Court: You left those in the maid's room, in the bedroom?

"A—Yes, sir."

Then she goes on and describes how she hid them while she was in the east.

You have got three different stories there, your Honor, told by the same witness during the course of the trial before your Honor.

There is another very interesting bit of information here, your Honor, and I think it may show why she was called under Section 43(b). They talked with this witness a long time, but they still didn't want to be bound by her testimony. I don't know whether they distrusted her or not, but I think if you will take the examination starting on page 29 you will see that this woman has to have words put in her mouth; she cannot repeat the story, your Honor, without being led along.

"Q—After you made the disclosure to Pinky Thompson"—I am reading on page 29.

The Court: I thought you gave her a pretty good going over on cross-examination.

Mr. Penney: I don't think I did. If I did, I didn't accomplish the result I started out to accomplish. [21]

"Q—After you made the disclosure to Pinky Thompson who was the next person to whom you made a statement that this was a fake robbery?

"A—I do not recall anyone else.

"Q—Well, you made a disclosure to Mr. Taylor here, did you not?

"A—Yes, sir.

"Q—Was there anybody else that you ever disclosed these facts to at all?

"A—Not that I recall.

"Q—So that we have it straight now: Pinky Thompson and his assistant, and Mr. Taylor are the only persons that you ever told that this was a fake robbery?

"Mr. Bledsoe: You mean outside of the attorneys in this case?

"Mr. Penney: No, all told.

"Mr. Bledsoe: I object to that as incompetent, irrelevant and immaterial, who she disclosed it to; it is a question simply of whether it was or was not a fake robbery.

"Mr. Penney: All objections are saved except as to the form of the question in our usual stipulation.

"Mr. Bledsoe: Yes.

"Mr. Penney: I will reframe the question.

"Q—You told me that you made disclosure of this fact that this was a fake robbery to Pinky Thompson and to his assistant, and to Mr. Charles B. Taylor. Have you made any [22] disclosure to any other persons other than these three that this was a fake robbery?

"A—I do not recall.

"Mr. Taylor: We might save a little time if I could interrupt with one question. Otherwise I will have to ask it at the end. Otherwise, I think she don't understand the question.

"Mr. Penney: Do you understand me?

"The Witness: You mean did I discuss it with a lot more people?

"Q—Yes.

"A—No.

"Q—The answer is no?

"A—Yes.

"Q—You understood my question, didn't you?

"A—Yes.

"Mr. Taylor: You did disclose to the attorneys for the insurance company, did you not?

"The Witness: Yes, I did.

"Mr. Bledsoe: Mr. Davis and myself?

"The Witness: Yes."

I don't know what could be clearer. I asked her, further than that, at the bottom of page 31:

"Q—Did you ever discuss this matter with Mr. *Leach* since he broke up the jewelry?

"A—No, sir." [23]

Mr. McAnally and Mr. Davis, so I understood, and the transcript shows, went down there and they spent an afternoon, three hours in San Diego, sometime in the summer of 1942. She denies that she ever discussed it with him after he broke it up.

The Court: I think she admitted later she went down there with them and introduced them, but I think she denied she had discussed the matter with *Leach*; that she introduced them.

Mr. Penney: She went down there ahead of time, your Honor. She admits herself they spent three hours there.

Your Honor, the theory that this case was tried on was a theory of conspiracy. You can't establish conspiracy by the testimony of a conspirator. That testimony was

offered in this case under Section 43(b), and the only purpose that it could serve would be that it would be used against her. It can't be used against Williams. You can't establish a conspiracy by her declarations.

If this was a conspiracy, your Honor, to defraud it started in 1939, either two days or two weeks before the robbery, depending on which version the court wishes to take, and it ended when the money was paid in March of 1940.

The declarations of a co-conspirator during that period of time would be evidence against both conspirators only during the period of time that the conspiracy exists.

You must establish the conspiracy first before those [24] declarations can be used against either of them. There hasn't been one iota of testimony offered in this case of any declarations during that period of time that would be binding on him, or any act that would be binding upon him.

This woman has brought into court two pieces of jewelry that the man who appraised them positively says was not the jewelry that he appraised, positively, under oath.

The Court: Of course, it is a little late discovering that. I am not much impressed by that testimony.

Mr. Penney: I tried my case down in the office a little better.

The Court: You shouldn't feel badly about it. I don't know of any lawyer who doesn't do that.

Mr. Penney: I find I am human in that regard, your Honor. I think of more bright things to say afterwards, too, than I think of during the course of the trial.

I think there are a lot of things that I overlooked, and I overlooked them in this case, and I am here to tell you

that I will take that responsibility, and there are a lot of things that I am not going to go outside the record to tell you why. But, to go on here with this situation, let's just analyze this one point.

The only connection, the only possible connection that could have tied Williams in with this deal was the shaking of hands in a car down in San Diego. No one has ever placed this jewelry in Williams' hands, no one has ever gotten a [25] statement from Williams of any kind or character that would incriminate him in the slightest degree. Not a bit; not a bit, your Honor. And if you take these two pieces of jewelry as corroboration, they are produced by the co-conspirator, so that doesn't add anything to it.

I don't think that I am unusually stupid, your Honor, but I would say that a man who is a radio technician, who breaks up jewelry, and who says that he believes, or he was told—

The Court: A dental technician.

Mr. Penney: A dental technician, if he is breaking up jewelry under these circumstances, your Honor, I would say that he is as much a conspirator as anybody else, and he cannot clothe himself with some dignity by saying, "Well, just old friends, I would do it for her."

Your Honor, there isn't a single solitary thing except that one bit of evidence for her corroboration; not a bit.

Your Honor, the law in California with regard to civil conspiracy is covered in the case of *Del Campo v. Camarillo*. I didn't cite that in my list of authorities, but it gives the information that I think clearly shows that the evidence in this case could not by any stretch of the imagination establish the conspiracy, in the first place, nor could her acts or declarations subsequently, after the conspiracy

is over, according to this theory, ever hold or bind him.
On page 653— [26]

Mr. Bledsoe: What is the citation?

Mr. Penney: 154 Cal. at 647. I am reading from page 653:

"Many authorities are cited by the respective counsel in regard to the rule concerning the admissibility and effect of such declarations."

They are talking about declarations of co-conspirators.

"There is no serious disagreement on the subject. The rule is that such declarations of one conspirator, made while the conspiracy is pending and during the progress of the plan adopted for its accomplishment, are admissible against both. But, if made after the act designed is fully accomplished and after the object of the conspiracy has been either attained or finally defeated, the declaration will be admissible only against the person who made it."

It shows that her declarations here in court, your Honor, are admissible only against her. The conspiracy was completed years ago.

"Nor are such declarations admissible against a co-conspirator to prove the formation of the conspiracy."

Citing Section 1870, subdivision 6, of the Code of Civil Procedure.

"The plaintiffs contend that in the present case, at the time this declaration was made by Juan E. Camarillo in March, 1905, the object and purpose of the conspiracy had not been accomplished, and hence that the declaration was [27] evidence against Adolfo. Their theory is that the purpose of the conspiracy was to obtain the interest of their mother in the property and to keep possession thereof as long as they lived, and that at any time during

the life of the two conspirators, while they remained in possession and ownership of the property, the declaration of either as to the conspiracy would be admissible against the other. In our opinion this theory is absolutely untenable. The object of the conspiracy, if there was any, was to obtain from the mother her interest in the rancho. That object was fully accomplished when they secured the execution of a deed from her to them conveying to them her interest. The deed, being executed, immediately vested in them whatever interest the mother had. Nothing further remained to be done in furtherance of the conspiracy, or to effect the object for which it was formed."

The Court: Is that 134 or 154?

Mr. Penney: 154. Aside from that, your Honor, I haven't anything further to urge upon the court that isn't contained in the brief, except to say this: This woman, there is no question about that, is vindictive. They have gone through a very bitter contested divorce action. Why she does these things, I don't know. A judgment against her means nothing. The evidence in this case shows that the defendant Sydney Williams has a judgment against her at the present time for things which she took, was ordered [28] to return, and has never returned. So this civil judgment means nothing to her.

I can't understand the insurance company. Your Honor, if they believe this story, I can't understand why they didn't go over to the District Attorney's office. Here is a woman who admits she has stolen \$4,000 from them. Your Honor, this case was filed a month before the statute of limitations expired. The statute of limitations against that crime expired in March. This case is filed in **February**, one month before that. So that there is no chance to go over there at this time and do anything with her.

The judgment against her means nothing. It means everything against him. It means everything against him. And she can accomplish her purpose by a civil judgment as well as she could by a criminal prosecution, and still at the same time run no risk of being charged with any offense.

I feel, your Honor, that there must have been something in the course of this trial that I have overlooked. I can't believe her story.

Mr. Bledsoe: If the court please, referring, first, to the authority Mr. Penney has cited, I believe he cited it during the trial. I can't recall any evidence having been introduced of any declarations of either of the defendants, extrajudicial declarations, which are referred to in that case.

The defendant Williams was called and gave testimony. [29] The case to which Mr. Penney has referred refers to extrajudicial statements or admissions.

As to the time the conspiracy terminated, if it terminated at the time of the false hold-up, that is one thing. However, the conspiracy is continuing, and as far as the defendant Williams is concerned it is continuing to this date, because part of the conspiracy was to hide the fact and to refuse to disclose that there was not a hold-up, and to assert that there was. That is being asserted to this date, and the object of the conspiracy has never terminated, so far as the defendant Williams is concerned.

As to the statute of limitations, or why the District Attorney didn't prosecute somebody, I don't know. The evidence is, and it is shown, this came to the insurance company rather late. It had been hidden from everybody for a long period of time, and after a divorce suit—and it

is true, maybe the co-defendant is bitter, it is obvious—she disclosed the true facts.

Now, the whole weakness in Mr. Penney's argument is this, that he speaks only of what he says are inconsistencies in the co-defendant's testimony. In fact, he refers to the deposition. At the time of the trial he asked her about it, and they went through that at length, most of this transcript is concerned with her testimony, however, he doesn't mention any place, except incidentally, as to Mr. *Leach*. I might say here, *Leach* did testify she did not [30] disclose to him that there was or was not a robbery. She merely asked him if he would talk to a representative or two from the insurance company, and Mr. *Leach* testified until he sat here in court he didn't really know what the story was, although he said, "I had my suspicions."

Now, there is no attempt here on this motion for a new trial to impeach Mr. *Leach*. In fact, the arguments were those that were made by Mr. Penney at the conclusion of the trial almost wholly. There is nobody to impeach the people that were with *Leach*, two other people, Joneses. I believe; there is no attempt to impeach John Marcin.

Counsel says there is no corroboration. *Leach* testified as to breaking it up. The jewelry came from some place. The people there, they couldn't all come into the federal court, people that are disinterested, and commit perjury.

John Marcin testified as to the wristwatch, which was impeachment of Mr. Williams. I mean the ring. It was a two carat ring and not just a little one he sold them for two fifty.

The court could see these items that were put in the inventory there were purchased for very nominal money,

a ring for two fifty, a watch for fifty-five, that was put in with an attachment for three fifty. Of course, Mr. Williams, as pointed out, attempted to explain that by saying he had it appraised at the import value. Mr. Lippett said no it [31] was not appraised at the import value, nobody does that, it was appraised at its actual value.

For instance, we had here a Mrs. Louise Berrenberg. Mrs. Berrenberg was a woman who came into court—the court I am sure knew she was telling the truth—who saw these stones after they were broken up. Mr. Williams said he never saw her before, nor had he ever been to San Diego during that year. He knows that we had Irma Cudd here, a girl who remembers this particular transaction of the large stone. None of the witnesses here are attacked, and they must all be attacked, if the court please, for this judgment to be overturned, or for the defendant Elizabeth Williams' testimony to be false. They must all be attacked. None of them are attacked, because there is nothing upon which they could attack them.

Counsel states he wishes to call two witnesses who were here in court, and our points and authorities show that isn't a proper motion for a new trial, because it is neither newly-discovered evidence nor evidence which with diligence the defendant could not have produced at the time.

I am surprised counsel has been unable to pick up more inconsistencies than he has. I won't go into arguing the inconsistencies of the defendant Williams' testimony. The court was even surprised at some of the testimony. The court remembers that at the time of the trial the court even interrupted to ask him if he actually reached into his hip [32] pocket at the time the robbery was talked about. He said yes.

He even denied she took a purse on a trip like that. It was obvious if she took a purse she would have lost the cigarette case.

Counsel goes on about the boards, and I think the court pointed out his criticism of the boards, and I don't think there is any inconsistency there.

Now, turn to page 218, if we may, line 18. I think that is obviously a typographical error. She testified in the deposition that at the time of the trip she took the one small ring and wristwatch, which obviously she didn't break up, that she had taken it out of there. The answer was: "Not so long. He took the ring and the watch out."

I think that must be a typographical error, I don't know, because it is obvious she testified she took the ring and the watch out of the box in which it had been placed. I can't say, maybe the reporter can tell us, but that is an inconsistency that is obvious on its face.

As I said before, almost every point, including the question of extrajudicial statements, were argued at the time of the trial. Counsel here hasn't shown, in my opinion, any single reason either why the court's original judgment was wrong or how in any manner the witnesses which he now wishes to call, two of which were in court, would change the result. [33]

In order to change the result here counsel would have to show that at least eight witnesses, corroborative witnesses, were testifying falsely and untrue.

As to the question that counsel states he didn't count the diamonds and stones, and so forth, if the court will look on page 266 at line 8, there is one place I noticed some discrepancy. Mr. Lippett was on the witness stand. We have an affidavit on file why he was called as a rebuttal

witness rather than as a direct witness. But when he was on the stand he said without his original appraisal he couldn't say whether those were the actual articles he had appraised or not. However, at page 266 I stated:

"I want to call the court's attention to the description of the item. I don't know if that was the witness' description. In other words, there is some discrepancy here, or will be, in the amount of diamonds."

I think some witness mentioned that fact too. I think even Williams did. I know the court was well aware of that fact. The explanation, of course, was that this was sent in to the insurance company as an appraisal and description, and the complaint took that description as best we could.

I submit, if the court please, that there isn't any showing of surprise or newly-discovered evidence.

The Court: I think I would like to examine the points that are made in counsel's brief and give consideration to your motion for a new trial. [34]

Mr. Penney: Your Honor, I just have one more comment to make. I think Mr. Bledsoe is somewhat confused as to what corroboration is.

The Court: As to what?

Mr. Penney: As to what corroboration would be. I think if the court will recall Mr. Williams was never up there, and certainly they can't corroborate her, your Honor, by something which she does. Mrs. Berrenberg certainly can't corroborate her, your Honor, because that corroboration doesn't tie in Mr. Williams. Mr. Williams

has never been present at any time. I think if the court will go over that evidence there of Mr. Leach's he will come to the same conclusion I came to, and that is he is somewhat confused. He says in there that the stuff that was melted down—I think he even had to use a blow torch on one of these and couldn't melt it down. That couldn't be a soft metal, it couldn't be gold. But the fact remains Mr. Williams wasn't up there, and we have to take Mrs. Williams' story in its entirety, and there isn't any single witness that ties Mr. Williams in on this transaction at all except Mrs. Williams.

The Court: Thank you. The matter will be submitted.

[Endorsed] Apr. 4, 1945. [35]

[Endorsed]: No. 11052. United States Circuit Court of Appeals for the Ninth Circuit. Sidney M. Williams, Appellant, vs. Continental Insurance Company of New York, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 3, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the
United States Circuit Court of Appeals
for the Ninth Circuit

No. 11052

SYDNEY M. WILLIAMS,

Appellant,

vs.

THE CONTINENTAL INSURANCE COMPANY
OF NEW YORK, a corporation,

Appellee.

STATEMENT OF POINTS UPON WHICH APPEL-
LANT INTENDS TO RELY IN THE APPEAL
OF THIS CASE

I

That the findings of fact do not support the conclusions
of law or judgment in said case.

II

That the judgment is contrary to law.

III

That the evidence is insufficient to sustain the findings
of fact of the trial court.

IV

That the trial court failed to make findings on material
issues raised by the pleadings, to wit:

- A. What the actual value was of those certain
articles set forth in appellant's proof of loss and
specifically mentioned in Paragraph IX of appellee's
complaint.
- B. Whether or not appellant falsely or fraudulently
represented the value of **said** articles.
- C. That certain of the articles of jewelry involved
in the alleged fraud of which appellee complains

were, at the time of the trial and judgment, in the possession of appellee.

- D. That certain articles introduced in evidence as having been involved in said holdup were not the articles listed in or covered by appellee's policy of insurance nor the articles listed in appellant's proof of loss.

V

That the judgment is excessive in that it appears from the evidence that appellee had possession of certain articles of jewelry alleged to have been set forth in appellant's proof of loss; whereas said judgment now includes the value of said articles in possession of the appellee without giving credit therefor to this appellant.

VI

That the trial court erred in denying appellant's motion for a new trial.

VII

That the court erred in denying appellant's motion to amend findings of fact and conclusions of law and direct the entry of a new judgment.

VIII

That the court erred in denying appellant's motion to correct the findings and to make the same more definite and certain.

Dated this 17th day of May 1945.

GEORGE PENNEY

Attorney for Appellant

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 18, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION REGARDING PLAINTIFF'S EXHIBIT NO. 12 IN RECORD ON APPEAL

Whereas, plaintiff's Exhibit No. 12 consists of a voluminous sealed Superior Court file now in the custody and possession of the County Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, being No. D 198085 of the records of said court, and

Whereas, said entire file was received in evidence and considered in its entirety by the trial court in arriving at its decision, and

Whereas, the Clerk of the United States District Court of the Southern District of California did not certify said exhibit as part of the exhibits in said case for the reason that he did not have, or could not obtain, custody or possession of the same,

It Is Hereby Stipulated by and between counsel for the respective parties hereto that plaintiff's Exhibit No. 12, being a sealed divorce file in the case of Williams vs. Williams, No. D 198085 in the records of the Superior Court of the State of California, in and for the County of Los Angeles, need not be transmitted to the Clerk of the above-entitled court as an exhibit herein, until ordered or requested by the Justices thereof, in which event appellant will secure, or attempt to secure, the said file from the Superior Court of the State of California, in and for the County of Los Angeles, for the possession and use of the

Justices of the above-entitled court in the consideration of the appeal herein.

It Is Further Stipulated that the Clerk of the District Court of the United States in and for the Southern District of California execute and file with the Clerk of the above-entitled court his Supplemental Certificate, certifying that said divorce file above referred to was received in evidence by the District Court of the United States during the trial of the above-entitled proceedings therein, and is Exhibit No. 12 in the records of said District Court in said matter.

Dated: May 25, 1945.

GEORGE PENNEY and
JEAN WUNDERLICH

By: JEAN WUNDERLICH
Attorneys for Appellant

HINDMAN & DAVIS &
HUNTINGTON P. BLEDSOE

By: HUNTINGTON P. BLEDSOE
Attorneys for Appellee

ORDER

Pursuant to the above stipulation, It Is Hereby Ordered that Exhibit No. 12, introduced during the trial of the above-entitled cause, need not be transmitted to the Clerk of the above-entitled court until further order of this court, and that the clerk of the United States District Court, in and for the Southern District of California, be and he is hereby directed to issue a Supplemental Certificate showing and certifying that said Exhibit No. 12, consisting of the file of the divorce action No. D 198085 in the records of the Superior Court of the State of California, in and for the County of Los Angeles, is and was received in evidence as an exhibit during the trial of the above-entitled cause, if such be the fact.

Dated: May 28, 1945.

FRANCIS H. GARRECHT
United States Circuit Judge

[Endorsed]: Filed May 29, 1945. Paul P. O'Brien,
Clerk.

No. 11052.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SYDNEY M. WILLIAMS,

Appellant,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,
a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

GEORGE PENNEY,

939 Rowan Building, Los Angeles 13,

Attorney for Appellant.

JEAN WUNDERLICH,

Of Counsel.

FILED

SEP 22 1945

PAUL P. O'BRIEN,
CLERK

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II.

If Exhibits 7 and 8 were in fact Items 1 and 2 of the list appearing on page 17 of the record, then the judgment is erroneous inasmuch as it compensates the plaintiff for having paid for those articles in spite of the fact that plaintiff had retrieved them. If, however, Exhibits 7 and 8 are not Items 1 and 2 of said list, then there is no proof that those articles were not lost and the entire story of Elizabeth J. Williams is then hopelessly discredited.....	19
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No. 11052.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SYDNEY M. WILLIAMS,

Appellant,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,
a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction of District Court.

The Continental Insurance Company of New York, a New York corporation, filed an action in fraud for money against Sydney M. Williams and Elizabeth J. Williams in the District Court of the United States, Southern District of California, Central Division. It is alleged that the District Court had jurisdiction [Tr. p. 2, paragraph 3] because the controversy is of a civil nature wholly between citizens of different states, and that the amount in issue exceeds the jurisdictional minimum of \$3000, exclusive of interest and costs.

On the basis of this allegation, the District Court had jurisdiction under the provisions of 28 U. S. C. A., section 41.

Jurisdiction of Circuit Court of Appeals.

This Honorable Court has jurisdiction to review the judgment rendered against Sydney M. Williams by said District Court under the provisions of 28 U. S. C. A., section 225.

Statement of the Case.

Plaintiff, hereinafter referred to for brevity as the insurer, filed an action against Sydney M. Williams and Elizabeth J. Williams in which it alleged that it issued to Sydney M. Williams two insurance policies, one in the sum of \$4300 on jewelry specifically listed therein, and another covering unscheduled personal property, limiting the amounts to \$250 on account of loss of jewelry, watches, and furs, and \$50 on account of loss of money [Tr. pp. 3, 4]. Later, by agreement, two specified items were dropped from the \$4300 policy, and Elizabeth J. Williams was added to both policies as an assured.

The complaint then states that defendants represented to the insurer that while this policy was in effect they had been held up on December 31, 1939, in Calexico and that there had been taken from them as a result of the holdup seven items of property specifically listed on page 5 of the transcript.

The complaint proceeds to aver that claim for the loss of said items was made, approved, and paid in the amount of \$3950 on one policy and \$300 on the other [Tr. p. 7]. It is then asserted that no robbery in fact occurred and that defendants' statements were false and fraudulent and

conceived as a "false and fraudulent scheme to deceive and defraud the plaintiff" [Tr. p. 9]. The alleged fraudulent claim is then averred to have resulted in damages to the insurer in the sum of \$4250 plus interest [Tr. p. 10].

Sydney M. Williams filed a separate answer, in which he denied the allegations of a fraudulent claim and affirmatively averred that the robbery did in fact occur [Tr. pp. 10-11].

Defendant Elizabeth J. Williams filed a separate answer, admitting the allegations of a fraudulent claim between herself and Sydney M. Williams, but denying that she received any benefits from the transaction [Tr. p. 12].

The case was tried to the court without a jury, the court rendering judgment for the insurer as prayed [Tr. p. 24].

Defendant Sydney M. Williams thereafter made a motion for a new trial and also a motion to amend findings of fact and conclusions of law and motion to make findings of fact and conclusions of law more certain, which were supported by extensive affidavits [See Record, pp. 30-46 and 365-393], but the motions for a new trial, for amended findings, and for more definite and certain findings were denied [Tr. pp. 46-47].

Thereupon, within the time allowed by law, this appeal followed.

Specification of Errors.

Appellant hereby makes the following specifications of error:

1. That the evidence is insufficient to sustain the findings of fact, conclusions of law and judgment.
2. That the judgment is excessive in that it appears from the evidence that appellee had possession of certain articles of jewelry alleged to have been set forth in appellant's proof of loss; whereas said judgment now includes the value of said articles in possession of the appellee without giving credit therefor to appellant.
3. That the trial court erred as follows:
 - (a) in denying appellant's motion for a new trial;
 - (b) in denying appellant's motion to amend findings of fact and conclusions of law and directs the entry of a new judgment;
 - (c) in denying appellant's motion to correct the findings and to make the same more definite and certain.

ARGUMENT.

I.

The Complaint, the Findings of Fact and Conclusions of Law, and the Evidence, Being Predicated on a Scheme or Conspiracy, the Judgment Could Not Be Based on the Uncorroborated Admissions of One of the Alleged Conspirators.

(a) THE CASE WAS PLEADED AND TRIED ON THE THEORY OF A CONSPIRACY.

The vital question in this case is, Did a holdup actually occur?

If it did, the judgment of the court is obviously erroneous; if it did not, a judgment for the plaintiff was in order, although, as we shall show in point II, the particular judgment rendered in this case would be improper and excessive even then.

The complaint alleges certain acts of the defendants, such as the taking out of the policies, the listing therein of certain property owned by the defendants, the reporting of a holdup in Calexico, the subsequent filing of a verified claim based on the alleged holdup, and the subsequent payment of the claim by the insurance company, believing that the holdup had occurred. It is further claimed that said alleged holdup was reported entirely by design and procurement on defendants' part for the purpose of defrauding plaintiff [Tr. p. 9]. On the same page of the record we read as a further allegation that each and all of the representations made by the defendants "were part of a false and fraudulent scheme to deceive and defraud the plaintiff."

The identical language is used in the findings of fact [Tr. p. 21]. There can be no doubt that the entire

complaint, although the precise term "conspiracy" is not used, was conceived and the case was tried on the theory that a conspiracy to defraud had been committed. Two people, to wit, the defendant Sydney M. Williams and his then wife Elizabeth J. Williams, are supposed to have concocted a scheme by which they would fake the holdup by procurement and design in order to obtain money not rightfully belonging to them from the insurance company.

If further proof is needed that the case was conceived to be one of conspiracy and that it was so tried, we need to refer only to the record on new trial [Tr. pp. 385-393], where the requirements concerning the sufficiency of the evidence were discussed and where it plainly appeared that everybody proceeded on the theory that this case involved a conspiracy and that the evidence should be required to measure up to the rules pertaining to civil conspiracies.

(b) SUMMARY OF THE EVIDENCE.

This being the case, a detailed examination of the evidence is required. The coconspirators are said to have been the appellant Sydney M. Williams and Elizabeth J. Williams, husband and wife. The parties became estranged shortly after some of the alleged fraudulent acts and later divorced each other. While husband and wife, driving home one evening in Los Angeles, the husband is supposed to have said to his then wife, "This would be a beautiful spot for a holdup." No one else was present. On December 31, 1939, the two went to Calexico. She claims she did not take any jewelry except some cheap costume jewelry which she claims she previously bought on Hollywood Boulevard at the instigation of her husband [Tr. pp. 76, 84]. According to her Mr. Williams wore only a wristwatch, but none of the items labeled 1, 2, 3,

4, 5, or 6 in the proof of loss [Tr. p. 5] was taken along, and the wristwatch which Mr. Williams was supposed to have worn on the day in question was later, so the witness claims, thrown into the All-American Canal during a trip to Yuma. No one else was present during any of these occurrences. Before the couple left for Calexico, so the conspirator claims, he told her he had planned on having the holdup on the way to Mr. and Mrs. Brown's house. He is supposed to have said that "We were going to go down there and collect the money on the diamonds and going to have a fake holdup" [Tr. p. 83]. According to her no holdup occurred, but on the way to the Browns they discussed how they would rush up to their house, and they then did rush up to the Browns and claimed they had been robbed [Tr. p. 81]. She claims the jewelry which was listed as having been stolen in the proof of loss was hidden in the house of the parties. Mr. Williams is supposed to have taken two 2x4's, chiseled a cavity into each of them, put the jewelry into the cavities, nailed the 2x4's together, then she claims he hid them in the plaster in an unfinished room of their common residence [Tr. p. 85].

The couple separated on the 8th day of May, 1940, and shortly thereafter Sydney M. Williams is reported to have gone to the house and announced to his estranged wife that they were going to have the diamonds broken up. He is then said to have taken the jewelry from its hiding place, where it had remained undisturbed all that time [Tr. p. 100]. Not knowing anyone who was able to break up the jewelry [Tr. p. 101], it is claimed he asked his estranged wife for assistance. She apparently knew a Mr. Leitch, a dental laboratory technician in San Diego, who might be able to do it [Tr. p. 101].

Then follows the equally fantastic trip to San Diego, which this estranged couple is supposed to have taken and during which the husband, Sydney M. Williams, is supposed to have remained downstairs in a car on University Avenue during a full afternoon [Tr. p. 103] while his estranged wife went to the dental laboratory technician to have the jewelry broken up. Items 1 and 3 of the list on page 7 of the transcript were not broken up, although Elizabeth J. Williams had them with her at the time in Mr. Leitch's laboratory [Tr. pp. 103-105]. On this breaking-up trip, Mr. Williams did not go into the laboratory of the dental technician, but it is claimed by her that she took Mr. Leitch to the waiting automobile and there introduced Mr. Leitch to Mr. Williams.

The foregoing is, in its essential outlines, the story as told by Mrs. Williams. The details are omitted in the interest of brevity. Her own recital of some of the events was self-contradictory, and therefore particular parts of the transcript show different and additional details. For the purpose of this appeal, however, it is sufficient to remember that she claims the holdup to have been planned in advance; that according to her none of the jewelry was actually lost; and that several months after the alleged holdup occurred and several months after the claim for the loss had been paid, and after she and her husband had separated, the jewelry was broken up in San Diego.

We do not deem it necessary to tell Sydney M. Williams' version in detail. It was in every essential, as well as in every particular, directly opposed to the version of his alleged conspirator. Only the fact that a trip was taken to Calexico and that in the course thereof they called on the Browns and reported the holdup was admitted. His claim is that the holdup was not faked and that it

actually occurred. He denies having thrown his wrist-watch into the All-American Canal; he denies the episode of the 2x4's; he denies ever having taken a trip to Mr. Leitch's laboratory in San Diego, or having met him there at all.

When we stop and consider the evidence so far, it appears that there is no independent proof whatever of any conspiracy; that is, no independent proof whatever of the fact that the holdup was prearranged and was faked, or that the jewelry was not lost as alleged.

In an effort to overcome this obvious difficulty in plaintiff's proof, there were called by plaintiff on his case in chief the following witnesses: Arthur Stanley Leitch, Lolita Leitch Jones, and Hugh James Jones; and subsequently by way of ostensible rebuttal, but in fact as further witnesses in chief, Louise Berrenberg, Irma Cudd, and Charles Griffin. None of these people, except Mr. Leitch who did the cutting up of the jewelry, claimed they saw Mr. Williams, but apparently Mr. Leitch's laboratory was quite a chummy place, because most of the rest of them happened to be there on the day in question for social purposes. They all had an opportunity, without being able to describe the jewelry in detail, to admire it and to testify to the effect that it had been brought there for the purpose of being broken up. Apparently nobody thought much of so unusual an incident in a dental laboratory, or, if they had "their suspicions," wisely kept silent about it, and hardly anybody expressed amazement that the laboratory technician was asked to cut up this valuable jewelry. The explanation which Elizabeth J. Williams gave one of the parties, namely, that they needed money, could only increase, but not allay, the "suspicions" of those present.

Inasmuch as plaintiff's counsel relied on this affair in San Diego as corroboration of Elizabeth J. Williams' story as an accomplice, it is important to keep in mind that this affair is claimed to have happened sometime in June, 1940, long after the alleged conspiracy had found its consummation by the payment of the various checks in settlement of the claim of loss on March 9, 1940. Therefore, even if it were believed, it would not be sufficient as corroboration; *first*, for the reason that it occurred several months after the alleged consummation of the conspiracy, and, *second*, it does not constitute independent corroboration of the conspiracy itself. Only Mr. Leitch claims to have seen Mr. Williams on the date in question, and Mr. Williams denies having been in San Diego on the purported trip. It is important that his bit of testimony be scrutinized carefully. In order to facilitate such a scrutiny, we are setting it out here in full:

“A. She left at that time, and I went downstairs with her to the car, where Mr. Williams was, and spoke to him for a moment, and they went on their way.

Q. What was said by Mr. Williams to you at that time, and by you to him? What conversation did you have? A. I don't believe there was a lot of conversation. I remember we shook hands through the car, and he made some mention of my doing it; I believe he thanked me for doing it.

Q. Then you went back? A. I went back to the office.

Q. And they went on in the car? A. Yes, sir.”
[Tr. p. 118.]

“Q. When you came down to the car, there was no one on the outside of the car, was there? A. No.

Q. Whoever was there was on the inside of the car? A. That is right.

Q. And it was dark when you came down, wasn't it? A. It wasn't so dark that I couldn't detect who I was talking to.

Q. Was it dusk? A. Just about dusk.

Q. Was this a coupe or a sedan? A. I thought it was a sedan.

Q. What kind of a sedan was it? A. Knowing cars, I know it was a Dodge.

Q. A Dodge sedan? [81] A. Yes.

Q. Light or dark color? A. I don't recall the color. It seems to me it was probably maroon.

Q. A maroon sedan? A. Yes.

Q. A maroon Dodge sedan? A. Yes. It may have been a coupe. I thought it was a sedan.

Q. Didn't Mrs. Williams come down to the car and say, 'I want you to say hello to Mr. Williams,' or something to that effect? A. I knew I was going down to meet him.

Q. You had been up with Mrs. Williams in the laboratory for how many hours? A. A couple or three hours, probably more than that.

Q. More than three hours? A. It may have been. I didn't work on it continually. I had other business to take care of. I didn't work on it continually.

Q. Could the person in that car have been someone else other than Mr. Williams? A. I don't think so.

Q. Could you be mistaken about the person you saw in that sedan? A. Anybody could be mistaken, but I am quite positive [82] it was Mr. Williams." [Tr., pp. 124-125.]

It is thus seen that every single act in the alleged conspiracy was related only as having occurred strictly between Mr. and Mrs. Williams, and that, outside of her uncorroborated story, *no essential act of the conspiracy, nor the conspiracy itself, was established, testified to, or corroborated by a single witness.*

It remains, therefore, merely to mention the authorities which hold that in such a state of the record the finding of a conspiracy is unsupported by the evidence.

(c) THE UNCORROBORATED STORY OF A CO-CONSPIRATOR IS INSUFFICIENT TO SUPPORT A JUDGMENT AGAINST THE CO-CONSPIRATOR.

The rule that there must be independent proof of a conspiracy before the admissions of a conspirator is admissible against the other was expressed in the early case of *Estate of James*, 124 Cal. 653 at 659, where the court said:

“It is also claimed that these witnesses were co-conspirators with the appellant Laura, and that as such conspirators their declarations were admissible. There is not sufficient evidence in the record of a conspiracy between these parties to justify the admission of the evidence upon that ground. As to the declarations of Laura, the appellant, they were admissible against her at least.”

The same rule is still more forcibly expressed in *Taylor v. Bernheim*, 58 Cal. App. 404 at 409, where the court said:

“Appellant complains of the ruling of the trial court striking out, as hearsay, on motion of plaintiff, certain declarations claimed to have been made by

Taylor, Jr., to one Samuels out of the presence of plaintiff, concerning the trading of an automobile belonging to Taylor, Jr., for the car in question.

“We are satisfied that the ruling of the trial court was correct. The declarations were not admissible under the theory that a fraudulent conspiracy existed between the two Taylors, as contended by appellant, for the reason that before declarations of one conspirator may be competent evidence against his confederate, there must be independent proof tending to establish the conspiracy, and such conspiracy itself cannot be proved as to either of the alleged co-conspirators by the evidence of the declarations of the other. (*Barkley v. Copeland*, 86 Cal. App. 483 [25 Pac. 1, 405].) There was no such independent proof here.”

In the leading case of *Del Campo v. Camarillo*, 154 Cal. 647 at 653, we read:

“Many authorities are cited by the respective counsel in regard to the rule concerning the admissibility and effect of such declarations. There is no serious disagreement on the subject. The rule is that such declarations of one conspirator, made while the conspiracy is pending and during the progress of the plan adopted for its accomplishment, are admissible against both. But, if made after the act designed is fully accomplished and after the object of the conspiracy has been either attained or finally defeated, the declaration will be admissible only against the person who made it. Nor are such declarations admissible against a co-conspirator to prove the formation of the conspiracy.

"The plaintiffs contend that in the present case, at the time this declaration was made by Juan E. Camarillo in March, 1905, the object and purpose of the conspiracy had not been accomplished, and hence that the declaration was evidence against Adolfo. Their theory is that the purpose of the conspiracy was to obtain the interest of their mother in the property and to keep possession thereof as long as they lived, and that at any time during the life of the two conspirators, while they remained in possession and ownership of the property, the declaration of either as to the conspiracy would be admissible against the other. In our opinion this theory is absolutely untenable. The object of the conspiracy if there was any, was to obtain from the mother her interest in the rancho. That object was fully accomplished when they secured the execution of a deed from her to them conveying to them her interest. The deed, being executed, immediately vested in them whatever interest the mother had. Nothing further remained to be done in furtherance of the conspiracy, or to effect the object for which it was formed."

Under the federal rules, the admissibility and weight of the evidence are governed (a) by the statutes of the United States, (b) by the rules of evidence heretofore applied in the United States courts, and (c) by the rules of evidence applied to the courts of general jurisdiction of the state in which the United States court is held.

As already stated, it is the rule in California, as well as in the federal courts, that proof of a conspiracy cannot rest solely and exclusively upon the testimony of a co-conspirator at the trial. Admissions of co-conspirators are admissible, but it is not their own testimony which can establish the conspiracy, and even their admissions against interest, confessing the conspiracy made to third parties, are not sufficient until and unless there is proof independent thereof that the conspiracy existed. Now, it is true that the court has the power to regulate the order of proof and may admit in evidence an admission of conspiracy before the conspiracy itself is established by independent evidence; but it remains true, nevertheless, that unless the fact of the conspiracy is later established by independent evidence, *the admission standing alone in and of itself is insufficient proof and will not support a judgment against the other party to the alleged conspiracy.*

Section 1870, subdivision 6 of the Code of Civil Procedure, provides:

“In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: . . . (6) *After proof of a conspiracy*, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.”

In 11 *Am. Jur.*, under the heading “Conspiracy,” paragraph 56, it is stated that the rules of evidence applicable to criminal prosecutions for conspiracy are ef-

fective in civil cases for conspiracy. The text expressly refers to paragraph 43 of the same article, in which some of the requirements in criminal cases are discussed, and there we read:

"Corroboration of Accomplice's Testimony.—A conspirator may be a witness in the prosecution of members of the conspiracy in which he participated, and his testimony is admissible as to all matters material and relevant to the issue. However, pursuant to the rule concerning accomplices generally, a conspirator cannot be convicted upon the testimony of his accomplice or accomplices unless such testimony is corroborated by other evidence tending to connect the accused with commission of the offense. Proof that the offense was committed and of the circumstances thereof is not enough."

In the case at bar, we have absolutely nothing more than the testimony of the accomplice or co-conspirator. We do not even have admissions of Mrs. Williams to third persons to the effect that the holdup was supposed to be faked. On the contrary, we have Mrs. Williams admitting the holdup under cross examination:

“Q. By Mr. Penney: Mrs. Williams, when were you married to Mr. Williams? A. June 3, 1939.

Q. And a divorce action was brought against you by Mr. Williams in 1940, was it not? A. Yes, sir.

Q. And you testified under oath in the Superior Court of the County of Los Angeles in that case, did you not? A. Yes, sir.

Q. And did you not at that time, while under oath, state, in substance or effect, that there was a robbery which occurred in Calexico on the 31st day of December, 1939, in which certain diamonds were taken from you and from Mr. Williams? A. I said there was, and I—" [Tr. p. 144.]

"Q. By Mr. Davis: Let me ask you this question: Isn't it a fact, Mrs. Williams, that the question of whether or not there had been a bona fide robbery in Calexico in 1939, in December, 1939, was never asked or gone into in the divorce proceeding? . . . A. No, it wasn't gone into.

Q. By Mr. Davis: And you did not testify in the divorce proceeding that there had been a bona fide robbery in Calexico in 1939? A. I don't remember. I think I did.

Q. You did what? A. I said there was a robbery. I don't remember exactly. I know it wasn't the main issue. I could be wrong." [Tr. pp. 145 and 146.]

In addition thereto, there was testimony that Elizabeth J. Williams stated to Barbara Lewbel that the holdup had occurred, the exact testimony being as follows:

"Q. By Mr. Penney: Mrs. Lewbel, you know Sydney Williams and Mrs. Williams? A. Yes, sir.

Q. Did you have occasion to see them on the first day of January, 1940? A. I did.

Q. Where did you see them at that time? A. At my home.

Q. Did you have any conversation with Mrs. Williams in regard to a hold-up in Calexico the day before? A. I did.

Q. Did she tell you, in substance or effect, that there had been a hold-up in Calexico, in which their diamonds and jewelry had been taken? A. She did.

Q. Did you have a conversation with her in regard to a mink coat she was wearing? A. Yes, I did.

Q. Did you tell her, in substance or effect, that it was a fine thing they hadn't taken the coat, and did she tell you, in substance or effect, that the coat would have been hard to dispose of after the hold-up and that was the reason they didn't take it? A. That is just what she told me." [Tr. pp. 248-249.]

Aside from the contradictory testimony of Elizabeth J. Williams what evidence is there to show a conspiracy to defraud? She says the holdup was faked; but she said that only during the trial. No witness testified that she made an admission during the pendency of the conspiracy or in its preparatory stages that the claimed events were faked. Her admissions at that time were the opposite. We do not believe that it is necessary to further labor this point. Under the rules applying to conspiracies, the testimony of the co-conspirator was not enough to connect Sydney M. Williams with the fraud. It was necessary that there should have been other evidence tending to connect him with the alleged wrongful acts. Such other evidence was, however, lacking.

II.

If Exhibits 7 and 8 Were in Fact Items 1 and 2 of the List Appearing on Page 17 of the Record, Then the Judgment Is Erroneous Inasmuch as It Compensates the Plaintiff for Having Paid for Those Articles in Spite of the Fact That Plaintiff Had Retrieved Them. If, However, Exhibits 7 and 8 Are Not Items 1 and 2 of Said List, Then There Is No Proof That Those Articles Were Not Lost and the Entire Story of Elizabeth J. Williams Is Then Hopelessly Discredited.

It will be remembered that during the trial there was introduced Exhibit 7, which, according to the testimony, purported to be identical with Item 1 referred to on page 16 of the transcript, and Item 1 referred to on page 17 of the transcript. The same applies to Exhibit 8, referred to as Item 3 on the list on page 16 and Item 2 on page 18 of the transcript. Items 1 on page 16 and page 17 agree in description, and Item 3 on page 16 and Item 2 on page 18 likewise agree. *But neither Exhibit 7 nor Exhibit 8 agree with the description of any item in the complaint.*

It was claimed in the course of the trial by Elizabeth J. Williams, that these two Exhibits 7 and 8 were not broken up during her trip to San Diego; that she retained and saved them intact from the mass of jewelry in question, and that subsequently she turned them over to the plaintiff insurance company, which had them in its possession during the trial and introduced them in evidence.

Now, it is obvious on inspection that Exhibit 7, which is to correspond with Item 1 on page 16 and Item 1 on page 17, is not a platinum and diamond watch with diamond bracelet attachment, containing 84 diamonds and

two baguettes, in that a count will reveal that Exhibit 7 contains only 64 diamonds. Obviously, Exhibit 7 is not Item 1 on pages 16 and 17 and, in order to conclusively demonstrate that fact, we have requested that that particular exhibit be submitted to the court.

Turning now to Item 3 on page 16 and 2 on page 18 of the Transcript, this is supposed to be a diamond friendship ring with 14 smaller round stones set in platinum. This was supposed to be Exhibit 8; but again a comparison of this exhibit with the description shows the exhibit to be different from that description in that the exhibit has only 12 stones rather than 14.

This discrepancy suggests one of two things: If the court was correct in disregarding it and finding that the items constitute two of the items involved in the alleged holdup and later saved, then it must have been obvious to the court that they had been retrieved and were in the possession of the insurance company at the time of the trial and that they could have not have their cake and eat it at the same time. In other words, since they had the articles, they could not be compensated for the money allegedly paid upon the representations that they were lost, and the judgment should have been reduced by \$650.

We, however, contend for the following result. Based on the inescapable fact that Exhibits 7 and 8 do not correspond with Items 1 and 3 on page 16 and Items 1 and 2 on pages 17 and 18 respectively, there can be only one conclusion: namely, *that the whole story of Elizabeth J. Williams is fabricated and untrue in accordance with her*

vindictive boast to one of the witnesses [Tr. pp. 250-251] that she was doing it to harass Mr. Williams. That being so, she did not save out of the alleged cutting up the items described on pages 16 and 17 of the Record, *but some other articles* which she delivered to the insurance company. The items in evidence were not the ones described in the schedules but sufficiently similar so as to escape a superficial examination.

This discrepancy between the exhibits and the schedules was not fully called to the court's attention until the motion for a new trial was made, and at that time an affidavit was presented, signed by Emanuel M. Lippett found on page 37 of the record, which reads as follows:

“Emanuel M. Lippett, being first duly sworn, on his oath deposes and says:

That he has examined the lady's wrist watch and the lady's ring, both of which articles were introduced in evidence in the above-entitled action. That neither the watch nor the ring is an article which your affiant appraised for insurance by the Continental Insurance Company at the time said company placed insurance on the jewelry of said Sydney M. Williams.”

It is clear, we submit, that if the judgment is to be sustained, a proper deduction for the items in question must be made from the judgment. But rather, we submit that the incident shows, like so many other contradictions in the record, that the testimony of Elizabeth J. Williams is so devoid of credibility that it should be disregarded as a matter of law.

III.

The Court Abused Its Discretion in Not Granting Defendant Sydney M. Williams' Motion for a New Trial.

In the case at bar, the trial court should have granted the motion for a new trial. The evidence was obviously insufficient to sustain the findings for the simple reason that the declarations of the co-conspirator were uncorroborated and therefore did not measure up to the legal standard required to support the judgment. A new trial should also have been granted because the judgment as it stood, even if our argument concerning co-conspirators were invalid, was too high by the sum of \$650, and a corresponding credit should have been given.

Under this state of the record, it was necessary to grant a new trial. It is necessary to grant a new trial whenever the judgment is contrary to the evidence. In passing on the question of whether the judgment is contrary to the evidence, the court is not restricted to instances where on motion it should have dismissed a verdict, but in addition the court is entitled to and should use "a certain indefinable range of discretion in the interest of judgment. The court may weigh the evidence, which it cannot do on motion for a directed verdict."

Cyclopedia of Federal Procedure, 2nd Ed., Vol. 8,
p. 125.

Apart from these compelling reasons why a new trial should have been granted, there are other considerations which impel us to submit that the denial of a new trial under the circumstances was an abuse of discretion.

Under the rules of civil procedure, a new trial may be granted where the case has been tried without a jury "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." (Rule 59(a).)

A. Newly-discovered evidence was a ground heretofore available on motions for new trials in the United States courts of equity.

Cyclopedia of Federal Procedure, 2nd Ed., Vol. 8.
p. 118.

B. The newly-discovered evidence referred to in the various affidavits on file herein fulfill all the conditions, under which evidence will be held to be newly discovered.

The affidavits submitted in support of the application for new trial are those of George Penney [Tr. pp. 30-34]; Rosalind Goodrich Bates [Tr. pp. 34-35], David Riskin [Tr. p. 36], Emanuel M. Lippett [Tr. p. 37], and Irving H. Lakin [Tr. pp. 37-38]. These affidavits fall into three classes: The affidavits of George Penney recites in detail efforts made on his part to obtain a deposition of the defendant Elizabeth J. Williams, who was out of town. This affidavit was not filed to discredit opposing counsel but merely to show the diligence exercised on the part of the attorney for Sydney M. Williams to ascertain the full and complete story of Elizabeth J. Williams. Above all, the affidavit recites in detail that it came to Mr. Penney's knowledge for the first time when he did take the deposition of Elizabeth J. Williams one day before the trial that she had consulted certain attorneys, to-wit, S. W. Thompson and Herbert Ganahl, and that he had informed these people of the story told by Mrs. Williams and that, when

asked whether she had previously related the same story to them, those gentlemen refused to give details concerning the disclosures made by Elizabeth J. Williams on those occasions, but declared their willingness to appear in court and testify, provided the court would find that the disclosure made to them were not privileged. They further assured George Pinney that the testimony which would then be given by them was of such a nature as to assist materially in a proper determination of the issues of this case.

The affidavit of Rosalind Goodrich Bates, commissioner in the domestic relations court in the year 1940, before whom a hearing was held in October 1940 (after the San Diego episode) sets forth that during that hearing Elizabeth J. Williams made no claim for any unmounted diamonds; she was not requested to return a two- or three-carat unmounted diamond to Sydney M. Williams; and that the only pieces of jewelry discussed during said hearing were a man's diamond ring and an Elk's pin. All this is in flat contradiction to the story of Elizabeth J. Williams.

The affidavits of David Riskin and Irving H. Lakin corroborate in detail the estimates of value given by Sydney M. Williams and therefore lend additional substance to his testimony.

Without analyzing these affidavits in further detail, we refer particularly to Mr. Penney's affidavit on page 33 of the Transcript. It cannot be gainsaid that had the two attorneys mentioned in Mr. Penney's affidavit been called they would have given testimony contradictory to the story of Elizabeth J. Williams on the stand. They were no longer bound by the privilege, because it had been waived by the acts of Elizabeth J. Williams on the stand.

(The authorities pertaining to this point are given in the footnote.)*

Nevertheless, their hesitancy in making a disclosure of the details in the circumstances is understandable, but it is also plain that they would have discouraged Mr. Penney from pursuing the matter if the story told by Elizabeth J.

*A. The attorney-client privilege does not exist in the following situations :

1. It is not for the attorney but for the client to assert the claim of privileged communication, and if the client has waived the privilege, the attorney cannot claim it.

Hunt v. Blackburn, 128 U. S. 464, 32 Law. Ed. 488, 9 Sup. Ct. 125;

Knaust Bros. Inc. v. Goldschlag, 34 F. Supp. 87;
In re Fisher, 51 F. (2d) 424.

2. The attorney may be interrogated preliminarily concerning the circumstances of his employment in order to enable the trial judge to determine, as a matter of fact, whether the privilege exists.

Chirac v. Reinicker, 11 Wheat. (24 U. S.) 280, 6 Law. Ed. 474.

3. If the privilege is claimed on the ground that to waive it would reveal incriminating testimony, this claim is valid only if the divulging of the alleged confidential communication would lead to a federal prosecution. The fact that the state may prosecute on the basis of the divulged information, or the fact that civil liability may be predicated upon it, does not prevent the disclosure or entitle the client to insist on the communication to his lawyer being kept secret.

United States v. Murdock, 284 U. S. 141, 76 Law. Ed. 210, 52 Sup. Ct. 63, 82 A. L. R. 1376.

4. Under the facts of the previous subparagraph, the privilege cannot be claimed where the disclosure cannot result in prosecution on account of anything about which the witness may testify; as, for instance, where the offense which his testimony would disclose is barred by the statute of limitations. In this case, the alleged acts of conspiracy to defraud occurred in the year 1939. The statute of limitations for felonies in the State of California, other than those specifically enumerated in section 800 of the Penal Code, is three years. Hence, criminal prosecution could not result to the

Williams to them had been in substantial accord with that given by her on the witness stand.

The affidavits further disclose, especially that of Emanuel M. Lippett, that the exhibits on which so much reliance was placed as being two of the insured articles

defendant Elizabeth J. Williams, and she can no longer claim that her communications to her attorneys are privileged.

Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. 652, 26 Sup. Ct. 370;

Brown v. Walker, 161 U. S. 591, 40 Law. Ed. 819, 16 Sup. Ct. 644;

Moore v. Backus, 76 Fed. (2d) 571, 101 A. L. R. 379.

B. The attorney-client privilege may be waived by the client under the following circumstances:

1. Where the disclosure to the attorney is made in the presence of other persons.

Hartzell v. United States, 72 Fed. (2d) 569;

York v. United States, 224 Fed. 88.

2. The privilege is waived where the client herself testifies to a portion of the transaction. This automatically opens the door not only for the balance of the transaction but also for the testimony of the attorney to whom the balance of the transaction was privately disclosed.

Cyclopedia of Federal Procedure, 2nd Ed., Vol. 7, p. 71.

"The privilege, as a personal one, may be waived. By offering to testify, a defendant waives his claim that his privilege against self-incrimination has been invaded. Ordinarily the privilege is waived if answer is made without claiming it, and if the witness testifies in part to incriminating facts he cannot resist being compelled to make a full disclosure."

Cyclopedia of Federal Procedure, 2nd Ed., Vol. 7, p. 77.

"Another method of waiving privilege is for the person entitled to claim it himself to testify voluntarily concerning the subject matter or himself call for or introduce the testimony or document. This rule has frequently been applied to the testimony of clients or patients concerning communications between them and their counsel or physicians, the door being thus opened to the testimony of the latter."

See also the numerous cases cited, especially

Knaust Bros. Inc. v. Goldschlag, *supra*; and

Steen v. First Natl. Bank of Sarcoxie, 298 Fed. 36,

in which it was held that the rule of waiver applies even though the witness was subpoenaed, and even though the witness's testimony was given on cross-examination.

alleged to have been lost in the holdup were not in fact the articles in question and did not conform to the description in the policy and were definitely not the articles appraised by the affiant for the purpose of insurance.

If we add to the foregoing situation the confusion of this particular record, the genuine surprise under which the trial attorney found himself, the impossibility of his ascertaining beforehand that Elizabeth J. Williams had consulted other attorneys, the extraordinary subject matter of the controversy, but, above all, if we consider that there was here involved the reputation and entire future of an attorney at law, it is hardly understandable how the trial judge could justify the denial of the motion for a new trial. In fact, we urge that in the light of the extreme delicacy of the questions involved, the tenuousness of the evidence, and the situation of the parties, it amounts to an abuse of discretion for the trial court to have refused the defendant Sydney M. Williams' motion for a new trial.

Conclusion.

In conclusion it is respectfully submitted:

1. That the only evidence of a conspiracy or of any of the overt acts leading up to the conspiracy and committed in the course of it rested exclusively in the confused, contradictory and discredited testimony of a co-conspirator. Not one single act, either of planning the holdup or of the holdup itself, or of any of the acts testified to by the vindictive ex-wife, were corroborated, and therefore the judgment as it stands is contrary to the evidence.
2. That if the evidence, by the utmost exercise of imagination, could be held to reveal a conspiracy, the

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No. 11052.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SYDNEY M. WILLIAMS,

Appellant,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,
a corporation,

Appellee.

APPELLEE'S ANSWER BRIEF.

Appellee's Statement of the Case.

Since no errors are assigned on rulings of law in the course of the trial or in the reception or rejection of evidence, and the whole tenor of appellant's brief is an invitation to this Appellate Court to review the entire evidence of a trial lasting several days, with many witnesses, to pass on disputed questions of fact, resolve conflicting inferences, and to test the credibility of witnesses; and since appellant has not even tried to make a fair and impartial statement of the facts adduced or to summarize all the evidence upon which the District Court based its findings, we believe that a proper consideration of this appeal can be had only by a complete statement of the case and thereafter by a discussion of appellant's specifications of error.

The evidence and the admissions in the pleadings show that prior to the 31st day of December, 1939, appellee, an insurance company, had insured appellant Sidney M. Williams and his wife, Elizabeth Williams, against loss by robbery (among other perils) of certain jewelry, which jewelry was as is specifically described in the complaint. [Tr. p. 17, fol. 22.]

That the jewels insured were all the jewels owned by either or both of the defendants, with the exception of a diamond Elk's pin, a small diamond ring owned by appellant, and a jeweled cigarette case owned by defendant, Elizabeth Williams. [Tr. p. 75, fol. 26.]

That sometime prior to December 31, 1939, appellant had been playing the stock market and was in need of funds, and had on several times broached the subject to his co-defendant, Elizabeth Williams, of cashing in on their insurance policies by a fraudulent claim of loss. [Tr. pp. 81, 82, fols. 34-35; p. 83, fol. 36.]

That shortly before December 31, 1939, in preparation for carrying out of this scheme, appellant procured two pieces of board (2x4s) from an unfinished attic room in defendants' home in Los Angeles, hollowed out a receptacle in these boards, wrapped and placed all the jewels, with the exception of the above-mentioned uninsured jewels and appellant's wristwatch and defendant Elizabeth Williams' wedding ring, in the receptacle, covered them with plaster of paris, and nailed the two boards together and secreted them in the unfinished room. [Tr. p. 84, fol. 39.]

Shortly prior to December 31, 1939, appellant and his co-defendant went to a Chinese store on Hollywood Boulevard in Los Angeles and there purchased a large

imitation diamond ring for \$1.95 or \$2.95 which was an imitation of defendant Elizabeth Williams' engagement ring, insured as Item No. 5. [P. Ex. 1.] [Tr. p. 76, fol. 27; p. 213, fol. 204.]

That on December 30, 1939, appellant, wearing the Gruen wristwatch, and his co-defendant, Elizabeth Williams, wearing her wedding ring and the imitation \$1.95 ring, drove from Los Angeles to Calexico, California, where they spent the night at a hotel, and the next morning, on December 31, 1939, drove to Yuma, Arizona. On the trip to Arizona, appellant removed the Gruen wristwatch which he was wearing and, while crossing the bridge over the All-American Canal, threw the Gruen wristwatch in the canal. [Tr. p. 77, fol. 29.]

They returned to Calexico and in the evening dined with friends, a Mr. and Mrs. Brown, across the border, in Mexicali, and then returned to the hotel. [Tr. p. 78, fol. 30.]

Defendant Elizabeth Williams went to bed, and about eleven o'clock was awakened by appellant, and they started walking to the home of Mr. and Mrs. Brown. About two blocks from the hotel, they stopped and decided that they would rush up to Mr. and Mrs. Brown's and tell them they had been held up. [Tr. p. 81, fol. 32.] They threw the imitation diamond ring away [Tr. p. 109, fol. 59] and rushed up to the Browns', door, and appellant said to the Browns, "We have just been held up a tall man and a short man." [Tr. p. 81, fol. 34.]

They thereafter went to the Police Station in Calexico and made the same report. [Tr. p. 80, fol. 33.]

On January 2, 1940, appellant reported to appellee that he and his wife had been held up in Calexico by armed

robbers who had taken all of the insureds' jewelry, in addition to \$96.00 cash, with the exception of defendant Elizabeth Williams' wedding ring, and gave the details of an alleged hold-up to the effect that they had been deprived of their property by a tall man and a short man armed with a revolver on December 31, 1939, at Calexico, California. [Tr. p. 181, fol. 159.]

On February 19, 1940, defendants presented sworn statements in proof of their loss as claimed; and on March 9, 1940, appellee paid to appellant and his co-defendant, by drafts payable to both, the amounts claimed in the proofs of loss, to-wit, \$4,250.00. [Tr. p. 11, fol. 10.]

The jewels remained where they had been placed between the two boards in the attic room in appellant's home until sometime in the latter part of May or the first of June, 1940 [Tr. p. 99, fol. 46] when appellant told his co-defendant that the jewels had to be broken up, *i.e.*, dismounted from their settings, and it was agreed that they would ask a Mr. Leitch, who owned a dental technician's laboratory in San Diego and who was a friend of defendant Elizabeth Williams' and an acquaintance of appellant's, to break up the jewels for them. [Tr. p. 101, fol. 48.]

Appellant thereupon retrieved the boards containing the jewels from their hiding place in the attic, and the defendants drove to Balboa where appellant had a boat, and on the boat appellant separated the boards and removed the jewels from their hiding place. [Tr. p. 101, fol. 49.]

They then drove to San Diego in a Dodge Coupe with the jewels. Appellant parked his car around the corner from University Avenue, on which street Mr. Leitch's

laboratory was located, and remained seated in the car while his co-defendant took the jewels to the laboratory [Tr. pp. 102-3, fols. 50-51] and there explained to Mr. Leitch that they wished the jewels removed from their settings as they needed money and could get more with the stones out of the settings than in the settings. [Tr. p. 115, fol. 68.] She did not ask Mr. Leitch to break up the diamond wristwatch and the friendship ring because appellant did not want them broken up. [Tr. p. 104, fol. 52.]

Mr. Leitch, using his dental technician's tools, proceeded to remove the jewels from the settings of the bracelet, engagement ring, and the man's ring. [Tr. p. 104, fol. 52.]

During the time that these jewels were being dismounted, there were present several people, to-wit, James Keith, witnesses Hugh Jones, Lolita Jones, and Mr. Lloyd, who observed the jewels and the process of dismounting and one of whom, witness Jones, assisted Mr. Leitch in the operation. [Tr. pp. 132, 138, 147.]

During the process of dismounting the jewels, which consumed several hours as Mr. Leitch was also engaged in other matters, Mr. Leitch asked defendant, Elizabeth Williams, to go to the car and bring appellant to the laboratory. Defendant Elizabeth Williams left the laboratory and returned later, reporting that Mr. Williams declined to come to the laboratory. [Tr. p. 117, fol. 71.]

After the jewels were dismounted, defendant Elizabeth Williams placed the unmounted jewels in a handkerchief and, together with Mr. Leitch, walked to the car, where they found appellant seated. Mr. Leitch, who knew appellant, having met him on several occasions prior to

this, shook hands with appellant, and appellant thanked him for dismounting the stones for defendants. [Tr. pp. 105, 117, fols. 54, 71.]

The defendants then returned to their home in Los Angeles where appellant placed the unmounted stones, together with the ladies' diamond watch and attachment and the friendship ring, in a handkerchief, put them in a document box and hid them in the attic room where the jewels had previously been hidden. [Tr. p. 106, fol. 56.] Shortly thereafter defendant Elizabeth Williams removed the ladies' wrist watch with the diamond attachment, and the friendship ring from this hiding place and hid them in another room in the house. [Tr. p. 239, fol. 238.]

Although defendants had separated sometime in May of 1940, they appeared to be on friendly terms, appellant having a key to their home, sleeping there on occasion, and, in July, financing a trip of his co-defendant to the East, appellant occupying the home during her visit.

During her trip to the East, the jewels apparently remained in the hiding place, as she found them there on her return from her trip; and, sometime in August, 1940, showed the uncut diamonds to a friend, witness Luise Berrenberg, afterwards returning them to their hiding place in the attic.

In August or September, 1940, appellant had moved from the home but still had a key to the outer door of the house. [Tr. p. 326, fol. 221; Tr. p. 227, fol. 222.] He had been demanding the unset jewels from his co-defendant, and one evening in August or September of 1940, defendant Elizabeth Williams attended a Bowl concert with some neighbors. Before leaving the house, she locked the door between the bathroom and the dressing room which gave access to the attic room and to which

appellant did not have a key. [Tr. p. 227, fols. 221, 222.] Upon her return home, she found a panel in the middle of the door leading to the attic room cut out and removed, giving access to the attic, and, upon investigation, found the unset diamonds gone. [Tr. p. 227, fol. 222.] The watch and the friendship ring were not taken, and she did not report the matter to the police for the reason that the unset diamonds were the only things taken.

Appellee's Answer to Appellant's Specification of Errors No. 1.

Although appellant's Specification of Errors No. 1 is insufficiency of the evidence to justify the findings, conclusions, and judgment, he does not point out any particular finding of which he complains; but since all of the Court's findings, with the exception of Findings 9 and 10, were alleged in the Complaint and admitted in the Answer, we must assume that the exceptions go to these two findings. [Tr. pp. 20-22, fols. 25-27.]

In these findings, the Court found that no robbery or loss had occurred at Calexico, or at any other place at all, and that defendants made the false representations that such a loss had occurred for the purpose of deceiving and defrauding the appellee, and did deceive and defraud the appellee and induce the payment by appellee to defendants of the sum of \$4250.00, and drew the obvious conclusions therefrom that appellee should have judgment in this amount.

Appellant's argument on this assignment is so confused and inconsistent that it is difficult to find a logical starting place for an argument against it. In effect, appellant has set up a straw man for this court and the appellee to knock down. He commences his argument by the gratui-

tous statement that the case, being predicated on a conspiracy, the judgment cannot be based on the uncorroborated admissions of one of the alleged conspirators, and then proceeds to argue that the case was pleaded and tried on the theory of conspiracy. However, he commences his argument (App. Brief p. 5) with the statement that the vital question in the case is, did a holdup occur? And that if it did not occur, the judgment of the court was obviously correct; in other words, if the District Court's findings 9 and 10 are supported by the evidence, the judgment is correct.

Appellant certainly cannot be unmindful of the rule that the Appellate Court will not resolve conflicting evidence or pass upon the credibility of witnesses, or that findings of fact will not be set aside unless clearly erroneous, and he has pointed out no place wherein the findings are not supported by the evidence.

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

Rule 52(a), Federal Rules of Civil Procedure.

This, of course, is the rule in this circuit.

Maryland Casualty Co. v. Stark, 109 Fed. Rep. (2d) 212 (9th Cir.);

Cherry-Burrell Co. v. Thatcher, 107 Fed. (2d) 65 (9th Cir.);

Lumbermen's Mut. Casualty Co. v. McIver, 110 Fed. (2d) 323 (9th Cir.);

Occidental Life Ins. Co. v. Thomas, 107 Fed. (2d) 876 (9th Cir.).

In the last case cited, the Court said:

"Questions as to the weight of the evidence are not to be decided by us."

With this rule in mind, it would appear that nothing more than the foregoing statement of the evidence adduced at the trial would be necessary to demonstrate the absolute correctness of the District Court's findings 9 and 10.

While the chief witness for appellee was appellant's co-defendant, who was called to the stand under the provisions of Rule 43(b) of Civil Procedure, the District Court believed her testimony over the impeached testimony of appellant; and the testimony of this witness was substantially corroborated by a great number of other witnesses and by admissions of appellant himself.

There was produced by defendant Elizabeth Williams' attorney, and introduced in evidence by appellee, a platinum diamond watch with a diamond bracelet attachment [Plaintiff's Exhibit 7—Tr. p. 111, fol. 63], and one diamond friendship ring [Plaintiff's Exhibit 8—Tr. p. 111, fol. 63]. Both defendants admitted that, with the exception of an Elk's pin, defendant Elizabeth Williams' cigarette case, and a small approximately one-carat man's diamond ring, they had no other jewelry than the jewelry appellant claims was taken from them by the robbers, although appellant claimed that Plaintiff's Exhibit 7 was not the watch which they owned, and that Elizabeth Williams had this in addition to the watch which he claimed was taken by the robbers. [Tr. p. 72, fol. 26; Tr. 164, fol. 137.] But, notwithstanding this, the defendants appeared in San Diego within a few months after they had received the insurance money and there, in the

presence of four unimpeached witnesses, had the elaborate bracelet and the two large diamond rings dismounted. One of these disinterested witnesses, Arthur Leitch, positively identified appellant as chivalrously sitting in the car while his wife had the jewels removed from their settings, and then thanking him, Leitch, for doing the job for them.

Defendant, Elizabeth Williams, positively identified Plaintiff's Exhibits 7 and 8 as the watch and friendship ring insured and for which the defendants made claim against appellee.

Witness Irma Cudd, a disinterested witness and unimpeached and familiar with the articles, identified Exhibits 7 and 8 as the watch and ring which Elizabeth Williams wore; and appellant himself testified that at all times after defendants were married, the insured wrist watch was the only wrist watch which she wore. [Tr. p. 178, fol. 54.]

Although the parties had no other jewels than the ones claimed to have been stolen, some time after the San Diego episode defendant Elizabeth Williams showed to witness Luise Berrenberg a number of loose unset diamonds. [Tr. p. 107, fol. 57; Tr. p. 313, fol. 339.]

Even though on an appeal of this kind it would be necessary to establish a weight of evidence, the above two incidents show an ample corroboration and weight, particularly as against the appellant's unsupported and impeached denials.

The District Court, having the advantage of observing the witnesses on the stand, their candor or lack of candor, their manner of testifying, and the many side-plays that do not appear in a record, chose to believe appellee's witnesses and to disbelieve the testimony of appellant. Ap-

pellant's lack of candor on the stand and his impeachment by testimony of other witnesses appear throughout the record, but this brief need not be burdened with more than a reference to a few of these instances.

Appellant denied positively that defendants had gone to Yuma on their trip to Calexico and denied that he had ever made a statement to that effect to appellee's adjuster, Robert Reynolds. [Tr. p. 202, fol. 189; Tr. p. 203, fol. 191.] Robert Reynolds, called as witness by appellee, testified positively that he did make such a statement, and his testimony was supported by a written memorandum made by said witness at the time. [Tr. p. 234, fol. 364; Defendants' Ex. AA, Tr. p. 339.] He denied going to San Diego and was impeached by the testimony of witness Arthur Leitch. He denied that he had ever seen the witness Berrenberg until she walked into the court room, but when vigorously cross-examined by the trial judge, he recanted. [Tr. p. 345, fol. 370; Tr. p. 346, fol. 371.] He said that the diamond and emerald bracelet cost over \$800.00 and that he paid for it in two checks [Tr. p. 157, fol. 128], but the witness Lippett, from whom he purchased the bracelet, testified that he paid for it in one check in the amount of \$355.00, and the cancelled check was introduced in evidence as Plaintiff's Exhibit 13. [Tr. p. 261, fol. 266; Tr. p. 263, fol. 268.] Many other instances of his lack of candor on the stand appear throughout the record; for instance, his inability to remember that he had purchased his wife a diamond wrist band for the watch, in his effort to deny the identity of Plaintiff's Exhibit 7 [Tr. p. 160, fol. 132], although he could remember with the most perfect detail the acquiring of every other item involved; his testimony with reference to the John Marcin ring. [Tr. p. 163, fol. 136; Tr. p. 272, fol. 285.] But we believe we have

pointed out sufficient instances of appellant's unreliability to demonstrate that the trial court was fully justified in disbelieving his story of the alleged robbery and adopting the appellee's version.

(a) ANSWER TO APPELLANT'S ARGUMENT THAT THE CASE WAS TRIED ON THE THEORY OF CONSPIRACY.

In view of the overwhelming evidence supporting the court's findings that appellant was liable for his own tortious acts and not for the acts of his co-defendant, we would not burden this brief with an answer to this argument, except for our belief that all points raised, however absurd, should be discussed.

This is an action in fraud wherein judgment was had against appellant for his own tortious acts. The gravamen of the action is not the conspiracy but the fraud perpetrated by appellant.

Appellant's co-defendant was a joint tort-feasor with appellant in perpetrating the wrong, and judgment from which she has not appealed, was had against her also.

"It is a general and well-settled principle of law that, where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitute the cause of action. (*Herron v. Hughes*, 25 Cal. 555; *Davitt v. Bakers' Union*, 124 Cal. 99 (56 Pac. 775); *Dowdell v. Carpy*, 129 Cal. 168 (61 Pac. 948); *Menner v. Slater*, 148 Cal. 284 (83 Pac. 35).) In such an action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity. (*Cohen v. Fisher*, 135

App. Div. 238 (120 N. Y. Supp. 546); *White v. White*, 132 Wis. 121 (111 N. W. 1116); *Miller v. John*, 208 Ill. 173 (70 N. E. 27).) A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or cooperated in inflicting a wrong upon him."

Revert v. Hesse, 184 Cal. 295.

See also:

McPhertridge v. Smith, 101 Cal. App. 122;
Bowman v. Wohlke, 166 Cal. 121;
Mox Incorporated v. Woods, 202 Cal. 674;
Tuman v. Brown, 59 Cal. App. (2d) 16;
5 Cal. Jur. 530;
15 C. J. Secun. 1040.

(b) ANSWER TO APPELLANT'S ARGUMENT THAT THE UNCORROBORATED STORY OF A CO-CONSPIRATOR IS INSUFFICIENT TO JUSTIFY A JUDGMENT AGAINST THE CO-CONSPIRATOR.

In view of the complete corroboration of the testimony of appellant's co-defendant, the above postulate, if true, would fall of its own weight, and we are again answering this argument only for the purpose of meeting all points raised in appellant's brief.

Appellant, on pages 12 and 13 of his brief, cites three California cases to the effect that *declarations* of a conspirator cannot be received against his co-conspirator before independent proof of the conspiracy has been adduced.

With these cases we have no quarrel but it must be noted that these cases all refer to *extra-judicial* statements and have no reference to testimony given under oath at a

trial. Although there is no assignment of error on the reception of any evidence of this sort, it will be noted that the trial court, in every instance where it appeared that extra-judicial statements of the co-defendant were given or about to be given, confined their admissibility to the co-defendant only.

Under this heading, on page 15 of his brief, appellant makes the statement that it is the rule in California, as well as in the federal courts, that proof of a conspiracy cannot rest solely upon the testimony of a co-conspirator at the trial. This is not the law.

Both under the California law and the rule in this circuit, a co-conspirator is a competent witness against another conspirator.

Rosenbaum v. Hernberg, 17 Cal. 602;

Wong Din v. United States, 135 Fed. 702 (9th Cir.).

And the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact except perjury and treason.

C. C. P. 1844.

And in the Federal Court, even in criminal cases, a person may be convicted on the uncorroborated testimony of an accomplice if the finder of facts find the testimony true and sufficient.

See the *Caminetti* case, 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442;

Henderson v. United States, 20 Fed. (2d) 90.

We cannot pass this phase of the case without commenting upon the absolute unfairness of appellant's argu-

ment on this phase. On pages 16 and 17 of appellant's brief, appellant attempts to show that his co-defendant had testified under oath contrary to the testimony given at this trial and quoted a portion of the testimony of this witness endeavoring to establish that contrary testimony had been given regarding the robbery at the divorce trial. Counsel does not advise the court that both of the reporters who reported the divorce case appeared, and at that time appellant stipulated that the reporters' notes do not show that Mrs. Williams ever made a statement to the effect that she had lost any jewelry in a robbery. [Tr. p. 269, fol. 276; Tr. p. 289, fol. 307.]

It is evident that defendant Elizabeth Williams participated in the fraud and joined in the false statements to plaintiff by which it was defrauded, but it is equally evident that when she decided to disclose the whole matter and tell the truth, that her statements thereafter were all consistent and her testimony on the trial was completely worthy of belief and was believed by the trial court.

Answer to Appellant's Specification of Error No. 2.

Under this specification of error, appellant makes the astounding contention that the court's judgment is erroneous in that it failed to credit appellant with the value of the platinum diamond watch and bracelet attachment (Plaintiff's Exhibit 7) and the diamond friendship ring (Plaintiff's Exhibit 8) which are now in the custody of the court as exhibits. Just what can be said in answer to such a contention! The matter was nowhere placed in issue. [Tr. p. 364, fol. 395; Tr. p. 11, fol. 10.] The testimony shows that the items were the separate property of defendant Elizabeth Williams who has not appealed. [Tr. p. 61, fol. 8; Tr. p. 60, fol. 7; Tr. p. 162, fol. 135.] Appellant denies that Exhibit 7 is the watch

that he made claim for, and denies or fails to remember, that he ever purchased a diamond bracelet for this watch. [Tr. 160, fol. 133; Tr. p. 163, fol. 135.] He denies that he had ever seen the ring (Plaintiff's Exhibit 7) before it was introduced into court. [Tr. p. 69, fol. 2.] Appellee does not have the items, did not retrieve them, and did not claim them. They were produced by defendant Elizabeth Williams' attorney and offered in evidence with the stipulation that they belonged to defendant Elizabeth Williams but that appellee would be responsible for them while in evidence. [Tr. p. 111, fol. 63; p. 365, fol. 395.] Appellee does not own the watch, never saw the diamond bracelet, or the friendship ring before they were introduced at the trial, and yet appellant wants credit for them in the judgment. What more can be said?

Answer to Appellant's Specification of Error No. 3.

Appellant under this assignment makes three subparagraphs, *to-wit*:

- (a) that the court erred in denying appellant's motion for a new trial;
- (b) in denying appellant's motion to amend findings;
- (c) in denying appellant's motion to correct findings.

Appellant does not argue the particular specifications, but for further sake of the record, we will briefly mention them.

Aside from his complaint of the insufficiency of the evidence, appellant in his motion to amend complained because the trial court did not make specific findings of the value of the jewels alleged to have been lost. The court found that the jewels were not lost or stolen and it therefore became immaterial what the exact value was so long as appellant had represented a value and received the sum represented from appellee.

The trial court is not required to make findings on all the facts presented but to find only such ultimate facts as are necessary to reach a decision in the case.

“The trial court is not required to make findings on all the facts presented and need only find such ultimate facts as are necessary to reach the decision in the case.”

Klimkiewicz v. Westminster Deposit & Trust Co.,
122 Fed. (2d) 957.

Also

Tulsa City Lines, Inc. v. Mains, 107 Fed. (2d)
377.

Under this assignment appellant also charges insufficiency of evidence and newly-discovered evidence. What has heretofore been said we believe sufficient to answer the insufficiency of evidence claimed, and this will not be discussed further.

Under newly-discovered evidence, which appellant argues to some length, he bases his case on affidavits filed in support of the motion for a new trial. Again we are forced to call the court's attention to the fact that he refers only to the affidavits filed on his behalf and does not even mention the contradictory affidavit filed by appellee.

It seems hardly necessary to call the court's attention to the well-settled rule that orders denying a new trial are not reviewable on appeal in the absence of a clear abuse of discretion, which has not been shown here.

United States v. Bransen, 142 Fed. (2d) 232, (9th Cir.)

Or that alleged newly-discovered evidence which would not materially change the result is not ground for a new trial.

Id.

Or that applicant for a new trial is required to rebut the presumption that there has been a lack of diligence.

Id.

Or that the application for a new trial will be denied where it appears that the degree of activity or diligence which led to the discovery of the evidence after the trial would have produced it had it been exercised prior thereto.

Id.

On its face, the affidavit filed by George Penney, attorney for appellant in support of his motion for a new trial, fails to show any diligence whatsoever in attempting to produce the testimony named as newly-discovered evidence. On the contrary, it shows a decided lack of diligence on appellant's part. The plea is that appellant was unable to learn of the necessity of or the existence of the testimony until after the taking of the deposition of his co-defendant. The record shows that the complaint herein was filed on February 4, 1943. [Tr. p. 10.] Said defendant was a resident of Los Angeles and available as a witness in a deposition until about four months before the trial on December 12, 1944. [Tr. p. 58, fol. 5.] The affidavit of H. P. Bledsoe, one of counsel for appellee, shows that after the time of the deposition and before the trial, he succeeded without difficulty in interviewing witnesses whose testimony is referred to in appellant's affidavit in support of his motion for a new trial. [Tr. pp. 39-46.] It is also noted that several of these witnesses

were present at the trial and conferred with the appellant and his attorney, which was not denied by appellant.

In view of the fact that the motion for a new trial is addressed to the sound discretion of the trial judge and that the appellate court will not review a ruling on such a motion in the absence of a clear abuse of discretion and only in the most exceptional circumstances, we believe enough has been said on this point.

In conclusion we respectfully submit that the findings and judgment of the trial court were correct and the judgment should be affirmed on this appeal.

Respectfully submitted,

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